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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-78

MEL KAHN, etc.,

Appellant,

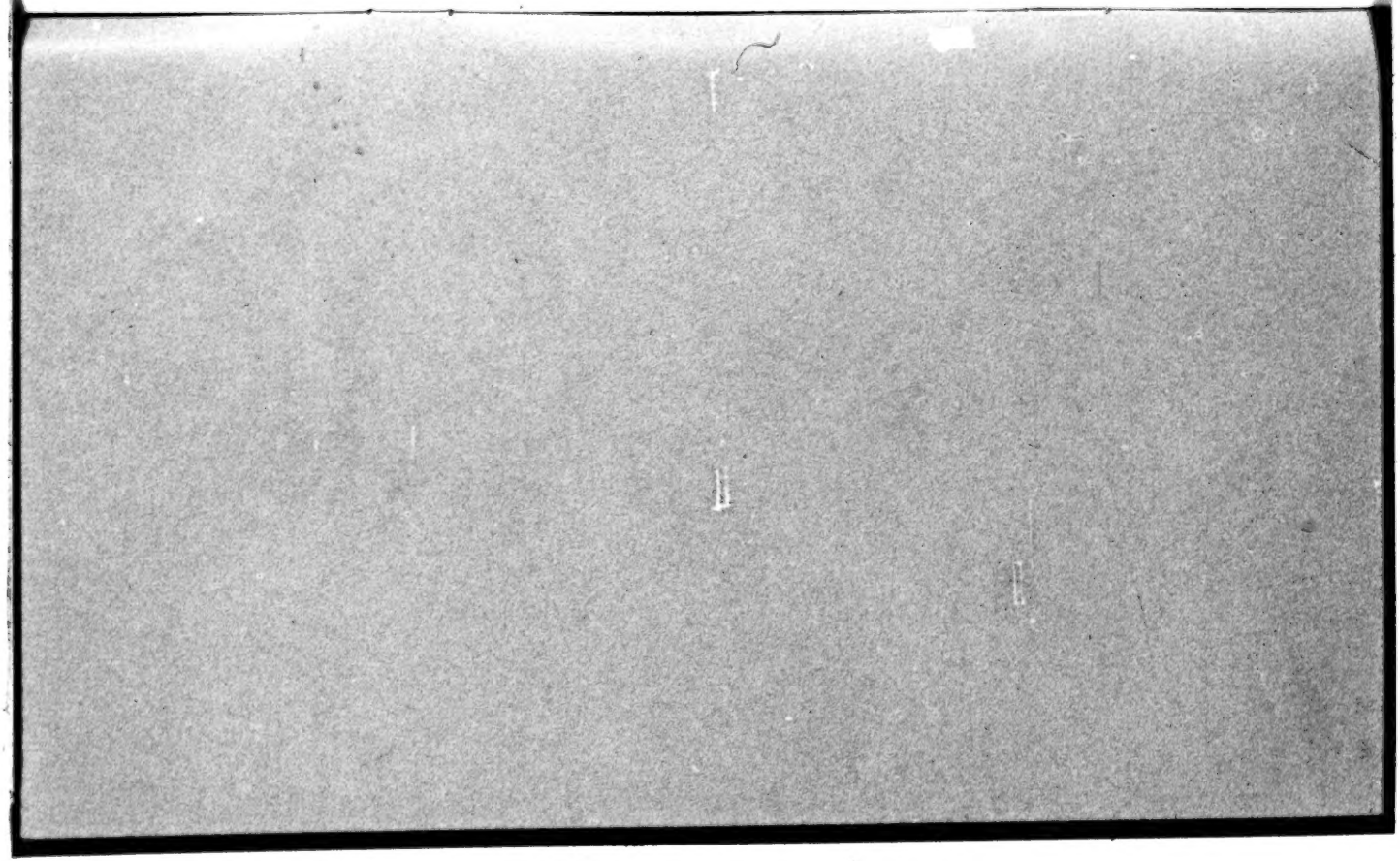
—v.—

ROBERT L. SHEVIN, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

JURISDICTIONAL STATEMENT FILED JULY 6, 1973
PROBABLE JURISDICTION NOTED OCTOBER 23, 1973



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Chronological List of Relevant Docket Entries

DATE OF FILING	
October 26, 1971	Complaint together with copy of Exhibit: Florida Statutes, Exemption, Sec. 196.191(7) attached thereto
December 3, 1971	Answer of defendants
January 18, 1972	Plaintiff's motion for summary judgment
January 21, 1972	Affidavit of plaintiff
March 8, 1972	Motion to intervene
March 8, 1972	Intervenor's motion for summary judgment
April 5, 1972	Defendants' motion for summary judgment
April 6, 1972	Order granting motion to intervene and setting cause for final hearing
April 21, 1972	Memorandum opinion and final judgment (Circuit Court, Eleventh Judicial Circuit, Dade County, Florida)
May 15, 1972	Notice of appeal
May 15, 1972	Assignments of error
May 15, 1972	Directions to clerk
May 25, 1972	Cross-assignments of error
February 7, 1973	Opinion and final judgment (Supreme Court of Florida)
March 8, 1973	Mandate from the Supreme Court of Florida
May 4, 1973	Notice of appeal to the United States Supreme Court

Complaint

IN THE

CIRCUIT COURT
OF THE 11TH JUDICIAL CIRCUIT OF FLORIDA

IN AND FOR DADE COUNTY

No. 71-20673

THOMAS A. TESTA

MEL KAHN, on behalf of himself
and all others similarly situated,

Plaintiffs,

vs.

J. ED STRAUGHN and A. H. BLAKE,

Defendants.

COME Now the plaintiffs, by and through their undersigned attorney, and sue the defendants, J. Ed Straughn and A. H. Blake, and allege:

1. This is a class action brought pursuant to Rule 1.220 of the Florida Rules of Civil Procedure in that the question presented is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court. The plaintiffs seek declaratory and injunctive relief and invoke the court's jurisdiction pursuant to Florida Statute, Sec. 86.011 and the Constitution of the State of Florida, Art. V, Sec. 6(3), respectively, in addition to the general equity powers of this court.

2. The plaintiff, Mel Kahn, a widower, is a bona fide resident of and a real property owner in the State of Florida.

3. The defendant J. Ed Straughn is the director of the Department of Revenue, the regulatory and supervisory body of the Dade County Tax Assessor.

4. The defendant A. H. Blake is the Dade County Tax Assessor.

5. On or about January 28, 1971, the plaintiff Kahn attempted to make proper application for property tax exemption to the defendants, their agents, employees or servants, pursuant to Florida Statute Sec. 196.191(7), a copy of which is attached hereto and made a part hereof. Plaintiff Kahn was not allowed to complete such application, in that he failed to comply with the statute, said statute applying to widows and not widowers.

6. Florida Statute Sec. 196.191(7) is unconstitutional as applied to all widowers seeking tax exemptions under its provisions in that the defendants' interpretation and construction of said statute violates the equal protection and due process clauses contained in Article I, Sections 2 and 9, of the Constitution of the State of Florida. By its force and effect, the aforementioned statute, as interpreted, construed and applied to all widowers in the State of Florida, unconstitutionally prohibits a surviving male spouse from securing the benefits of its provisions solely on the basis of sex discrimination.

7. No adequate administrative remedy or adequate remedy at law is available to plaintiffs.

8. According to the dictates of *Government Employees* v. *Windsor,* 353 U.S. 364, 1 L.Ed.2nd 894, 77 S.Ct. 838 (1957), as interpreted and construed in *England* v. *Louisiana State Board of Medical Examiners,* 375 U.S. 411, 11 L.Ed.2nd 440, 84 S.Ct. 461 (1964), plaintiffs inform this court that they further maintain that the aforementioned application of Florida Statute Sec. 196.191(7) is violative of the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States, but do not challenge the constitutionality of said statute on Federal grounds in this court. Plaintiffs expose these Federal claims here only for the purpose of complying with *Government Employees* v. *Windsor,* supra, so that the state statute may be construed in light of these claims and plaintiffs intend, should this State Court hold against them on the question of state law, to litigate these questions in the United States District Court for the Southern District of Florida for disposition of their Federal contentions.

WHEREFORE, the plaintiff respectfully prays, on behalf of himself and all other similarly situated, that this court:

a. Declare Florida Statute Sec. 196.191(7) unconstitutional as applied to plaintiff and members of his class.

b. Declare the exemption, which is the subject matter of Florida Statute Sec. 196.191(7), to be construed to include plaintiff and members of his class by an interpretation of the term "widows" to include "widowers".

c. Enjoin defendants, their agents, servants and employees from the future enforcement of Florida Statute Sec.

196.191(7) in any manner which deprives plaintiff and the class he represents of its benefits.

d. Grant such other and further relief as this Court may deem just and proper.

BILL HOPPE, Esq.
Counsel for Plaintiffs
c/o ACLU of Florida
2nd Floor, Concord Bldg.
66 W. Flagler Street
Miami, Florida 33130

STATUTE ANNEXED TO COMPLAINT

FLORIDA STATUTES

Ch. 196 EXEMPTION § 196.191

196.191 Property exempt from taxation

The following property shall be exempt from taxation:

(7) Property to the value of five hundred dollars to every widow and to every person who is a bona fide resident of the state and has lost a limb or been disabled in war or military hostilities or by misfortune.

Answer

IN THE

CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT
OF FLORIDA

IN AND FOR DADE COUNTY

No. 71-20673 (Judge Testa)

[CAPTION OMITTED]

COME Now the defendants, by and through their undersigned counsel, and answer the complaint filed herein as follows:

1. The defendants are without knowledge as to the allegations set forth in paragraphs 1, 2 and 5 of the complaint.

2. The defendants admit the allegations set forth in paragraphs 3 and 4 of the complaint.

3. The defendants deny the allegations set forth in paragraphs 6, 7 and 8 of the complaint.

4. The defendants deny each and every allegation not specifically admitted herein.

WHEREFORE, the defendants, Dade County, Florida, having answered the complaint filed herein, respectfully pray that the complaint filed herein be dismissed with prejudice and at cost to the plaintiffs.

STUART SIMON
Dade County Attorney
1626 Dade County Courthouse
Miami, Florida 33130

By: MURRAY A. GREENBERG
Asst. County Attorney

Affidavit

IN THE

CIRCUIT COURT
OF THE 11TH JUDICIAL CIRCUIT OF FLORIDA

IN AND FOR DADE COUNTY

No. 71-20673 (Testa)

[CAPTION OMITTED]

STATE OF FLORIDA,
COUNTY OF DADE, *ss.*:

BEFORE ME, the undersigned authority, personally appeared MEL KAHN, who, first being duly cautioned and sworn, deposes and says:

1. That affiant is an adult bona fide resident of and a real property owner in the State of Florida.

2. That affiant is a widower.

3. That on or about January 28, 1971, affiant attempted to make proper application for a property tax exemption to the Dade County Tax Assessor's office, pursuant to Florida Statutes §196.191(7).

4. That affiant was informed that he failed to comply with the statute in that said statute applied only to widows and not to widowers.

5. That affiant was not allowed to complete said application due to the aforementioned reason.

6. That affiant was unable to secure the property tax exemption sought pursuant to Florida Statutes §196.191(7) due to the fact that he is a widower.

FURTHER AFFIANT SAYETH NOT.

MEL KAHN

SWORN TO and subscribed before me
this 21 day of Jan 1972.

IRENE FIGUERA
Notary Public
State of Florida at Large

My commission expires: 5-18-75

Plaintiff's Motion for Summary Judgment

IN THE

CIRCUIT COURT
OF THE 11TH JUDICIAL CIRCUIT OF FLORIDA

IN AND FOR DADE COUNTY

No. 71-20673 (Testa)

[CAPTION OMITTED]

Plaintiff, by and through his undersigned attorney, respectfully moves this Honorable Court for the entry of a summary judgment in favor of the plaintiff and the class he represents for the reason that there is no genuine issue as to any material fact and they are thus entitled to a judgment as a matter of law.

The plaintiff and the class he represents further state that, in support of this motion, all pleadings and affidavits filed in this cause will be relied upon.

Dated: January 14, 1972.

BILL HOPPE, Esq.
Counsel for Plaintiff
c/o ACLU of Florida
2nd Flr., Concord Bldg.
66 W. Flagler Street
Miami, Florida 33130

Motion to Intervene

IN THE

CIRCUIT COURT
OF THE 11TH JUDICIAL CIRCUIT OF FLORIDA

IN AND FOR DADE COUNTY

Case No. 71-20673

[CAPTION OMITTED]

ROBERT L. SHEVIN as Attorney General of the State of Florida moves to intervene pursuant to RCP 1.230 and as grounds therefore states:

1. The complaint attacks the constitutionality of Section 196.191 (7), Florida Statutes.

2. Section 86.091, Florida Statutes, provides that if any statute is alleged to be unconstitutional:

> ". . . the Attorney General or the State Attorney of the judicial circuit in which the action is pending shall be served with a copy of the complaint and be entitled to be heard."

ROBERT L. SHEVIN
Attorney General

BARRY SCOTT RICHARD
Assistant Attorney General
Chief, South Florida Division

Intervenor's Motion for Summary Judgment

IN THE

CIRCUIT COURT
OF THE 11TH JUDICIAL CIRCUIT OF FLORIDA

IN AND FOR DADE COUNTY

Case No. 71-20673

[CAPTION OMITTED]

ROBERT L. SHEVIN as Attorney General of the State of Florida, intervenor, hereby moves for summary judgment on the following grounds:

1. There are no disputed issues of fact.

2. Section 196.191 (7) is constitutional on its face and as applied to the plaintiffs.

3. This Court is without jurisdiction to extend the provisions of Section 196.191 (7), Florida Statutes, to include the plaintiffs.

ROBERT L. SHEVIN
Attorney General

BARRY SCOTT RICHARD
Assistant Attorney General
Chief, South Florida Division

Defendants' Motion for Summary Judgment

IN THE

CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT
OF FLORIDA

IN AND FOR DADE COUNTY

No. 71-20673 (Judge Testa)

[CAPTION OMITTED]

COME Now the defendants, J. Ed Straughn and A. H. Blake, by and through their undersigned counsel, and move this Honorable Court to grant summary judgment in their favor. As grounds therefore they state that there are no genuine issues of material fact and would rely upon the memorandum submitted by them on February 4, 1972 and the memorandum of the intervenor submitted on February 16, 1972.

STUART SIMON
County Attorney
1626 Dade County Courthouse
Miami, Florida 33130

By: MURRAY A. GREENBERG
Assistant County Attorney

Order Granting Motion to Intervene and Setting Cause for Final Hearing

IN THE

CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT
OF FLORIDA

IN AND FOR DADE COUNTY

No. 71-20673 (Judge Testa)

[CAPTION OMITTED]

Upon consideration of the premises herein, it is hereby

ORDERED and ADJUDGED:

1. That the motion of Robert L. Shevin, as Attorney General of the State of Florida, to intervene in this lawsuit be, and the same hereby is, granted.

2. That the Court will call for final hearing all pending motions in this cause on Wednesday, April 12, 1972, at 1:00 o'clock P.M.

DONE and ORDERED in Chambers, at Miami, Dade County, Florida, on this 6 day of April, 1972.

THOMAS A. TESTA
Circuit Judge

BARRY SCOTT RICHARD
Assistant Attorney General
State Office Building
1350 N.W. 12th Ave., Room 530
Miami, Florida 33136

Copies furnished to:

MURRAY A. GREENBERG
Assistant County Attorney
1626 Dade County Courthouse
Miami, Florida 33130

COLSON & HICKS
Second Floor—Concord Building
Miami, Florida 33130
(Attn: Bill Hoppe)

Memorandum Opinion and Final Judgment, Circuit Court for the Eleventh Judicial Circuit, Dade County, Florida

(April 21, 1972)

This document is printed in the Appendix to the Jurisdictional Statement at A1-A3.

Notice of Appeal

IN THE

CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT
OF FLORIDA

IN AND FOR DADE COUNTY

No. 71-20673 (Judge Testa)

MEL KAHN, ETC.,

Plaintiff,

vs.

J. ED STRAUGHN and A. H. BLAKE,

Defendants.

ROBERT L. SHEVIN, as Attorney General of the State of Florida, Intervenor, takes and enters his appeal to the Supreme Court of Florida to review the Memorandum Opinion and Final Judgment in favor of the Plaintiff rendered by the Circuit Court of the Eleventh Judicial Circuit of Florida in and for Dade County, bearing date of 21st day of April 1972, and rendered and recorded in Book Number 7672 at page number 416 on April 25, 1972.

I HEREBY CERTIFY that a copy of the foregoing Notice of Appeal was served by mail upon Honorable Bill Hoppe, c/o ACLU of Florida, 66 West Flagler Street, Miami, Florida 33130, and Honorable Murray A. Greenberg, Assistant County Attorney, 1626 Dade County Courthouse, Miami, Florida 33130, this 12th day of May, 1972.

ROBERT L. SHEVIN
Attorney General
BARRY SCOTT RICHARD
Assistant Attorney General

Opinion and Final Judgment, Supreme Court of Florida

(February 7, 1973)

This document is printed in the Appendix to the Jurisdictional Statement at A4-A7.

Mandate From Supreme Court of Florida

To the Honorable, the Judges of the Circuit Court .... for the Eleventh Judicial Circuit of Florida. Greeting:

WHEREAS, Lately in the Circuit Court of .... for the County of Dade in a cause wherein

MEL KAHN, ETC., was plaintiff

and

J. ED STRAUGHN and A. H. BLAKE, were defendant

No. 71-20673 (Judge Testa)

the Judgment of said Circuit Court ..... was rendered April 25, 1972 as by the inspection of the transcript of the record of the said Circuit Court ..... which was brought into the Supreme Court of the State of Florida, by virtue of an appeal agreeably to the laws of said State in such case made and provided, fully and at large appears:

AND WHEREAS, at the January Term of said Supreme Court holden at Tallahassee, A. D. 1973, the said cause came on to be heard before the said Supreme Court on the said transcript of the record and was argued by counsel; in consideration whereof, on the 7th day February A. D. 1973 the said Supreme Court rendered its opinion and judgment in said cause as per copy thereof hereto attached and made a part hereof, case no. 42,371.

In Consideration Whereof, It Is Ordered by the Court that the appellants do have and recover of and from the appellee

costs in this behalf expended herein taxed at Twenty-Five Dollars, and that all other costs shall be taxed in the court in which the appeal was entered, therefore,

YOU ARE HEREBY COMMANDED, That such further proceedings be had in said cause as according to right, justice, the judgment of said Supreme Court, and the laws of the State of Florida, ought to be had, the said Judgment of the Circuit Court ..... notwithstanding.

WITNESS, The Honorable VASSAR B. CARLTON Chief Justice of said Supreme Court, and the seal of said Court at Tallahassee, this 8th day of March 1973.

(Signature illegible)
Clerk Supreme Court of Florida.

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Supreme Court, U. S.
FILED
JUL 6 1973
MICHAEL RODAK JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 73-78

MEL KAHN, etc.,
Appellants,

vs.

ROBERT L. SHEVIN, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

JURISDICTIONAL STATEMENT

BILL HOPPE
Attorney for Appellants
Second Floor, Concord Building
Miami, Florida 33130

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. .....

MEL KAHN, etc.,
Appellants,

vs.

ROBERT L. SHEVIN, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

JURISDICTIONAL STATEMENT

Appellants appeal from a Judgment of the Florida Supreme Court on February 7, 1973 which reversed the Memorandum Opinion and Final Judgment filed in the Circuit Court of the Eleventh Judicial Circuit of Dade County, Florida on April 21, 1972.

OPINION BELOW

The Opinion in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, is not reported. A copy of this Opinion is attached hereto as Appendix A. The Opinion of the Supreme Court of the State of Florida is reported in 273 So. 2d 72. A copy of this Opinion is attached hereto as Appendix B. The Notice of Appeal to this Court was filed on May 4, 1973, and is attached hereto as Appendix C.

JURISDICTION

Suit was brought under due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28 U.S.C. Section 1257(2).

QUESTION PRESENTED

Whether the classification of widows separate from widowers for the purpose of granting to widows a tax exemption on property to the value of $500.00 constitutes invidious discrimination in violation of the equal protection and due process provisions of the Federal Constitution.

STATUTES INVOLVED

United States Constitution, Fourteenth Amendment

F.S. 196.191(7)

STATEMENT

A Complaint for Declaratory Relief was filed by Appellee, Mel Kahn, as a class action pursuant to Rule 1.220 of the Florida Rules of Civil Procedure against A. H. Blake, Dade County Tax Assessor, J. Ed Straughn, Director of the Florida Department of Revenue as public officers charged with the administration of property tax laws; the Appellant, the Attorney General of the State of Florida, participated in the proceedings in the trial under an Order granting his motion to intervene pursuant to Section 86.091 of the Florida Statutes. The Appellee has alleged denial of his application for a $500.00 property tax ex-

emption under §196.191(7) and asserted that as a widower he and others similarly situated were deprived of equal protection and due process by the terms and application of the Statute limiting the exemption to widows. Appellant contends that by allowing widows to receive such an exemption without allowing widowers to, is in violation of the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution and therefore Florida Statute 196.191(7) is invalid or is invalid as applied. The Circuit Court of the Eleventh Judicial Circuit in and for Dade County ruled in Appellant's favor and ordered:

> 1. That Florida Statute 196.191(7) applies to feminine gender, is therefore discriminatory and arbitrary and is unconstitutonal and in violation of the equal protection clause of the Constitution of the United States.
>
> 2. That the Court is aware that this matter is of great importance to public and tax assessors throughout the entire State and directs that the parties originate an Appeal in the Supreme Court of Florida forthwith.

On appeal to the Supreme Court of Florida, the Supreme Court reversed the judgment of the Circuit Court and held F.S. 196.191(7) to be constitutional.

THE QUESTIONS ARE SUBSTANTIAL

The issues involved in this Appeal are similar to those raised by *Reed* v. *Reed,* 404 U.S. 71 (1971). Both in Reed and in this case, there is no distinction made by the governing body other than that of sex. While Reed merely dealt with the procedure used for appointing an

Executor/Executrix, this case deals with the power of the State to tax purely on a discriminatory basis. As between men who own property and women who own property, there is no rational justification for separate treatment, yet the State of Florida has not allowed widowers to receive the same treatment as widows. The Supreme Court of the State of Florida has attempted to point out an economic disparity between men and women as a basis for their opinion. The basis of the Statute, however, is not men and women, but men and women who own property. They are all members of the same entitlement class and should be equally entitled to the $500.00 exemption in taxes.

Today a woman is fully emancipated; Amendment XIX, U.S. Constitution. Their ability to enter all aspects of community life is virtually complete. A man's loss at the death of his spouse is equal to that of a woman although the woman's loss may move us more. The test as to whether a sex based discrimination is allowed is whether there is a rational distinction; and sex based discrimination has been nullified when no persuasive difference between men and women could be offered to justify difference in treatment. *Seidenburg* v. *McSorley's Ale House,* 317 F. Supp. 593 (1973). Florida Statute 196.191(7)'s exemption has no rational relation to any economic, social or political distinction. Its continued effect is discriminatory under the United States Constitution and creates a substantial inequality between widows and widowers in the State of Florida.

Respectfully submitted,

BILL HOPPE
Counsel for Appellants
Second Floor, Concord Building
Miami, Florida 33130

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Jurisdictional Statement was this 29... day of June, 1973, placed in the United States mail, postage prepaid, to the Attorney General, Attorney for Appellees, The Capitol, Tallahassee, Florida.

BILL HOPPE

APPENDIX A

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR DADE COUNTY

Case No. 71-20673

MEL KAHN, etc.,
Plaintiff,

vs.

J. ED STRAUGHN and A. H. BLAKE,
Defendants.

Memorandum Opinion and Final Judgment

THIS CAUSE having come on to be heard before me for final hearing and the Court having heard argument of counsel, and considered the memoranda submitted by counsel; now, finds;

That Florida Statute 196.191(7) allows a woman who has lost her spouse by death and has not remarried to claim a $500.00 exemption from taxes on property in this State.

That the Plaintiff, MEL KAHN, has lost his spouse by death and has not remarried but is denied the beneficial operation of this statute solely because he is a man.

That the courts of this State since the earliest days of statehood have used the word "widow" in a context which clearly denotes a woman who has lost her husband by death, *Wilson* v *Fridenburg*, 19 Fla. 461; *City of Jacksonville Beach* v *State*, 151 So2d 430; In re Beacher's Estate, 177 So2d 838, 3rd D.C.A. 1965; In re Estate of Yohn, 229 So2d 612, 1st D.C.A. 1969.

In a recent Florida Supreme Court opinion, the Court reversed a long line of cases which adhered to the common law, and now permits the wife to bring an action for loss of consortium and other services; heretofore only a husband could claim loss of consortium and services, the court recognized the inequity and struck down this unjust discrimination, *Gates* v *Foley*, Case No. 39,694 (1971) Supreme Court of Florida.

That the Legislature significantly took notice of the invidious discriminations and in their wisdom placed woman on an equal footing with man in respect to paying alimony and child support which historically had been reserved for men. Under the enactment of the "No Fault Divorce" law, the Courts may require a woman to pay her ex-husband alimony and support for the children, Florida Statute §61.08, Chapter 71-241 at 973 (1971).

Chief Justice Burger in a recent Supreme Court opinion, *Reed* v *Reed*, 30 L.Ed. 225, 92 S.Ct. ..... (November 22, 1971), employed the equal protection clause of the XIX Amendment as a shield against sexual discrimination on the basis of sex. This Court has made a clarion pronouncement that the 1868 Amendment will be relied upon to put laws involving sexual discrimination under the same tests as those related to racial discrimination. Justice Burger opined that mandatory preference to members of either sex over members of the other, "is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the 14th Amendment". The same Court in 1920 intoned that classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike", *Royster Guano Co.* v *Virginia*, 253 U.S. 412, 415, 64 L.Ed. 989, 990, 40 S.Ct. 560.

That full and complete emancipation of womanhood is withstanding any and all challenges based on sex differences alone, and the male opponents can anticipate that their generations of cherished "diggins" will be eroded to a point of total collapse.

The Florida Constitution, Article VII, Sec. 3 (6) 1968, exempts every *widow* from taxation in the amount of $500.00 without any reference to "widowers", and this Court is powerless to expand the meaning of "widow" to include both women and men, it is therefore,

ORDERED AND ADJUDGED

1. That Florida Statute Sec. 196.191 (7) applies to the feminine gender and is therefore discriminatory and arbitrary and is unconstitutional and in violation of the Equal Protection Clause of the Constitution of the United States and the Declaration of Rights, Article I, §2 of the Florida Constitution, and Florida Statute 196.191(7) is inoperative and is hereby stricken.

2. Further, the Court holds, based on the ore tenus motion of the County Attorney and Attorney General, that this Order is stayed pending an appeal.

3. That the Court is aware that this matter is of great importance to the public and tax assessors throughout the entire State and directs that the parties originate the appeal in the Supreme Court of Florida forthwith.

DONE and ORDERED in Chambers at Miami, Dade County, Florida, this 21 day of April, 1972.

/s/ Thomas A. Testa
Circuit Court Judge

APPENDIX B

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1973

CASE NO. 42,371

ROBERT L. SHEVIN, et al.,
Appellants,

v.

MEL KAHN, etc.,
Appellee.

Opinion filed February 7, 1973

An Appeal from the Circuit Court in and for Dade County, Thomas A. Testa, Judge

Robert L. Shevin, Attorney General; Barry Scott Richard, Deputy Attorney General and Winifred L. Wentworth, Assistant Attorney General; for Appellant

Bill Hoppe, for Appellee

McCAIN, J.

Appellants appeal from a final judgment of the Circuit Court for Dade County, Florida, holding Fla. Stat. §196.191(7)[1] invalid as a violation of the equal protec-

---

1. The various statutes relating to ad valorem taxation and exemptions therefrom were extensively revised by Chapter 71-133, Laws of Florida, which took effect on December 31, 1971. Inter alia, Fla.Stat. §196.191(7) was repealed as such and its substance incorporated in §196.202, which provides:

> "Property of widows, blind persons, and persons totally and permanently disabled—Property to the value of five hundred dollars ($500) of every widow, blind person, or totally and permanently disabled person who is a bona fide resident of this state shall be exempt from taxation."

tion clause of the Fourteenth Amendment of the United States Constitution and Art. I, §2, Declaration of Rights, Florida Constitution, 1968. We have jurisdiction pursuant to Fla. Const. Article V, §4(2).

Appellee, Kahn, filed his complaint for declaratory relief as a class action pursuant to Rule 1.220, F.R.C.P., and Fla. Stat. §86.011, alleging denial of his application for a $500 tax exemption under Fla. Stat. §196.191(7), and asserting that as a widower he and others similarly situated were deprived of equal protection and due process by the limitation of the exemption to "widows".

In his final judgment, the trial judge held:

> "The Florida Constitution, Article VII, Sec. 3(6) 1968, exempts every widow from taxation in the amount of $500.00 without any reference to 'widowers', [sic] and this Court is powerless to expand the meaning of 'widow' to include both women and men, it is therefore,
>
> "ORDERED AND ADJUDGED
>
> "1. That Florida Statute Sec. 196.191(7) applies to the feminine gender and is therefore discriminatory and arbitrary and is unconstitutional and in violation of the Equal Protection Clause of the Constitution of the United States and the Declaration of Rights, Article I, §2 of the Florida Constitution, and Florida Statute 196.191(7) is inoperative and is hereby stricken."

We agree that the term "widow" may not be judicially redefined to include a man who has lost his wife since the legislative intent obviously limits the application of the term only to a woman who has lost her husband by death. This definition is in conformance with

the unvarying legislative and judicial use of the term in other areas.[2]

Appellee stresses that inclusion or exclusion from classification under this statute is determined by the sex of the individual involved. While this fact is of significance, it is not enough to declare the statute unconstitutional as a violation of equal protection of the law. Both the Florida and federal courts have upheld classifications determined by sex in other areas.[3]

All that is required to uphold the classification of widow or widower contained in the statute in question is that it be shown that it "rests upon some ground of difference having a fair and substantial relation to the object of the legislation."[4] We cannot agree with the assertion that the classification of "widow" is not one which rests upon such a ground of difference.

It has been ably pointed out that the object of the legislation here in question is "to reduce to a limited extent the tax burden on widows who own property to the value of $500 and . . . thereby to 'reduce the disparity between the economic . . . capabilities of a man and a woman,' . . ." As recognized in Gruenwald v. Gardner,

---

2. See City of Jacksonville Beach v. State, 151 So. 2d 430 (Fla. 1963); Wilson v. Fridenburg, 19 Fla. 461 (1882); In re Estate of Yohn, 229 So. 2d 612 (Fla. App. 1st, 1969); In re Beacher's Estate, 177 So. 2d 838 (Fla. App. 3rd, 1965).

3. In Hoyt v. Florida, 368 U.S. 57 (1961), the United States Supreme Court unanimously affirmed the decision of this Court, Hoyt v. Florida 119 So. 2d 691 (Fla. 1959), upholding a classification determined by sex for the purpose of according a privileged status to women in jury registration. In Gruenwald v. Gardner, 390 F.2d 591 (2d Cir. 1968), the United States Court of Appeals upheld the constitutionality of certain provisions of the Social Security Act which accorded women more favorable treatment than men in computing social security benefits.

4. Reed v. Reed, 404 U.S. 71, 76 (1971).

supra, women workers as a class do not earn as much as men.[5] Certainly this has a "fair and substantial relation" to the ability of women property owners to pay taxes on property of even minimal value.

We recognize that steps have been and are continuing to be taken toward the elimination of legal barriers to equality of the sexes. Among the significant steps toward this end is the legislative provision for alimony and child support payments by women as well as men.[6] This provision, however, provides a means of taking into consideration the factual economic capability of each woman involved through judicial supervision and control.

Significantly, the provisions of the statute under review do not provide any means for similar consideration. Therefore, until the steps taken toward legal equality result in equality in fact, a finding of identity between the sexes at this time would rest on fiction and not fact.

Accordingly, it is our judgment that Fla. Stat. §196.191(7) is a valid legislative enactment. Therefore, the final judgment of the Circuit Court must be and is hereby reversed.

It is so ordered.

CARLTON, C.J., ROBERTS, ERVIN, BOYD and DEKLE, JJ. and WILLIAMS, Circuit Judge, Concur.

---

5. It is estimated that in 1970 the median annual earnings of all male workers with taxable earnings was $6,133 while only $2,734 for women. U.S. Dept. of H.E.W., Social Security Bull., Annual Statistical Supp., 1970, Table 34 at 50.

6. Fla. Stat. §61.08 (1972).

APPENDIX C

IN THE SUPREME COURT OF FLORIDA

CASE NO. 42,371

ROBERT L. SHEVIN, et al.,
Appellants,

vs.

MEL KAHN, etc.,
Appellee.

Notice of Appeal to the Supreme Court of the U. S.

Notice is hereby given that MEL KAHN, etc., the appellee above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Florida, reversing the decision entered in this action by the Circuit Court in and for Dade County on April 21, 1972, said reversal and opinion being filed by the Supreme Court of Florida on February 7, 1973.

This appeal is taken pursuant to 28 U.S.C. §1257(1).

/s/ Bill Hoppe
Attorney for Appellee
ACLU of Florida
66 West Flagler Street
Miami, Florida 33130

I certify that a copy hereof was furnished to Barry Scott Richard, Office of the Attorney General. The Capitol, Tallahassee, Florida, 32304 and to Murray A. Greenberg, Assistant County Attorney, 1626 Dade County Courthouse, Miami, Florida, 33130, by mail this 4th day of May, 1973.

/s/ Bill Hoppe
Attorney

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 73-78

MEL KAHN, etc.,
Appellants,

vs.

ROBERT L. SHEVIN, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

MOTION TO DISMISS OR AFFIRM

ROBERT L. SHEVIN
ATTORNEY GENERAL

Winifred L. Wentworth
Assistant Attorney General

Attorneys for Appellees
State of Florida

Capitol Building
Tallahassee, Florida 32304

IN THE

SUPREME COURT OF THE UNITED STATES

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ATTORNEY GENERAL

Winifred L. Wentworth
Assistant Attorney General

Attorneys for Appellees
State of Florida

Capitol Building
Tallahassee, Florida 32304

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MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of this Court Appellees file this motion to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Florida on the ground that it does not present a substantial federal question.

I.

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A.

The Statute

Florida Statutes §196.191(7) [amended and renumbered as Fla. Stat. §196.202 (1971)] is the statutory expression of the mandatory, self-executing tax exemption provision of Fla. Const. Art. VII, §3(b), which grants an exemption from taxation for property to the value of $500.00 owned by persons in certain enumerated categories. This exemption is extended to persons who are blind, persons who are totally and permanently disabled, and to widows. The exemption has been extended to widows since the adoption of Fla. Const. Art. IX, §9 (1885). As noted by the court below, the term "widow" as used in the subject statutory and constitutional provisions is limited to "a woman who has lost her husband by death." Shevin v. Kahn, 273 So.2d 72, 73 (1973).

B.

The Proceedings Below

The Appellant, a widower, filed a Complaint for Declaratory Relief in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida. He alleged that the denial of his application for a $500.00 property tax exemption under Fla. Stat. §196.191(7) deprived him and others similarly situated of equal protection and due process of law by the language and application of the statute which limits the exemption to widows. The Circuit Court ruled in Appellant's favor and a timely appeal was taken to the Supreme Court of Florida, which reversed the judgment of the Circuit Court and held that there was a reasonable relationship between the objective of reducing the disparity between the economic capabilities of men and women and the means used to achieve that objective in affording to women who have lost a spouse by death a slight tax advantage, and thus Fla. Stat. §196.191(7) is constitutionally valid.

II.

ARGUMENT

This appeal presents no substantial federal question warranting review by this Court.

It is well settled that in the field of taxation, a State may draw lines that treat one class of individuals different

from others without violating the Equal Protection Clause of the Fourteenth Amendment. Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973). See also Lawrence v. State Tax Commission of the State of Mississippi, 286 U.S. 276 (1932); Madden v. Kentucky, 309 U.S. 83 (1940); and Allied Stores of Ohio v. Bowers, 358 U.S. 522 (1959). The only limitation upon such distinctions is that the difference in treatment may not constitute an "invidious discrimination." Lehnhausen v. Lake Shore Auto Parts Co., supra, at 359.

The test approved unanimously by this Court in Reed v. Reed, 404 U.S. 71 (1971), for statutes which make classifications upon the basis of sex, is whether such a classification "bears a rational relationship to a state objective that is sought to be advanced by the operation of" the statute. Id. at 76. The majority of this Court was unwilling to apply a stricter test only last term in Frontiero v. Richardson, -- U.S. --, 93 S.Ct. 1764, 36 L.Ed. 2d 583 (1973).

According to the Florida Court, the objective sought by Fla. Stat. §196.191(7) and its constitutional counterpart is "to reduce to a limited extent the tax burden on widows who own property to the value of $500 and . . . thereby to 'reduce the disparity between the economic . . . capabilities of a man and a woman,' . . . . Shevin v. Kahn, supra, at 73. Such disparity has been judicially recognized as providing a rational basis for affording women treatment more favorable than men under the Social Security Act. Gruenwald

v. Gardner, 390 F.2d 591 (2d Cir. 1968), cert. denied, 393 U.S. 982. Statistics from the 1970 national census indicate the factual considerations underlying the distinction made in Fla. Stat. §196.191(7). In Florida in 1969, of families which had a male head of the household, 9.8% were below the poverty level, while of those which had a female head, 35.8% were below the poverty level. U.S. Bureau of the Census, Census of Population: 1970, GENERAL SOCIAL AND ECONOMIC CHARACTERISTICS, Final Report PC(1)-C11 Florida, April, 1972, at 203. The mean income in 1969 for all Florida families was $10,120, while that for Florida families with a female head of the household was only $5,718. Id. at 233. Florida also has a much higher percentage of widows than widowers. In 1970, of males aged 14 years and over, 3.4% were widowers, while 14.0% of the females in the same age group were widows. U.S. Bureau of Census, Census of Population: 1970, DETAILED CHARACTERISTICS, Final Report PC(1)-D11 Florida, October, 1972, at 679-80. Thus, unlike Reed v. Reed, supra, the considerations underlying the exemption provided by the Florida Constitution and Fla. Stat. §196.191(7) are not "merely to accomplish the elimination of hearings," id. at 76, or "for the sole purpose of achieving administrative convenience," Frontiero v. Richardson, supra, 93 S.Ct. at 1772, 36 L.Ed. 2d at 594.

III.

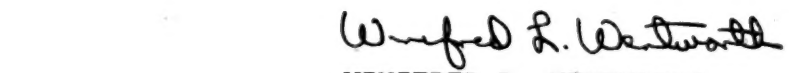
CONCLUSION

Wherefore, Appellees respectfully

submit that the questions upon which this cause depend are so unsubstantial as not to need further argument, and Appellees respectfully move the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Florida.

Respectfully submitted,

ROBERT L. SHEVIN
ATTORNEY GENERAL



WINIFRED L. WENTWORTH
Assistant Attorney General

The Capitol
Tallahassee, Florida 32304

Attorneys for Appellees
State of Florida

CERTIFICATE OF SERVICE

I, Winifred L. Wentworth, a member of the Bar of the Supreme Court of the United States, and of counsel for Appellees herein, hereby certify that I have this day served three (3) printed copies of the foregoing Motion to Dismiss or Affirm on the Appellant herein, by depositing same in a United States Post Office with first class postage prepaid addressed to counsel of record for the Appellant as follows:

Bill Hoppe
Counsel for Appellants
Second Floor, Concord Building
Miami, Florida 33130

DONE this the 27th day of September, 1973.

ROBERT L. SHEVIN
ATTORNEY GENERAL

Winifred L. Wentworth
Assistant Attorney General

The Capitol
Tallahassee, Florida 32304

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IN THE

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OCTOBER TERM, 1973

No. 73-78

MEL KAHN, etc.,

Appellants,

—v.—

ROBERT L. SHEVIN, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF FOR APPELLANTS

RUTH BADER GINSBURG
MELVIN L. WULF
BRENDA FEIGEN FASTEAU
CHRISTINE CASSADAY CURTIS
American Civil Liberties Union Foundation
22 East 40th Street
New York, New York 10016

WILLIAM HOPPE
Second Floor, Concord Building
Miami, Florida 33130

Attorneys for Appellants

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II. Upon determining that the gender-based classification in Fla. Stat. §196.191(7) violates the fourteenth amendment, this Court should remand to the court below for consideration whether, consistent with the dominant legislative purpose, the constitutional infirmity should be remedied by holding the exemption available to all widowed property owners 25

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TABLE OF AUTHORITIES

Cases:

Aiello v. Hanson, 359 F. Supp. 792 (N.D. Calif. 1973), *juris. statement filed sub nom.* Geduldig v. Aiello, 42 U.S.L.W. 3247 (Oct. 12, 1973) 12

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Bray v. Lee, 337 F. Supp. 934 (D. Mass. 1972) 9

Brenden v. Independent School District, 477 F.2d 1292 (8th Cir. 1973) 9

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Gomez v. Perez, 409 U.S. 535 (1973) 27
Graham v. Richardson, 403 U.S. 365 (1971) 27

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Green v. Waterford Board of Education, 473 F.2d 466 (10th Cir. 1972), *cert. den.*, 412 U.S. 906 (1973) 9, 23
Gruenwald v. Gardner, 390 F.2d 591 (2d Cir.), *cert. den.*, 393 U.S. 982 (1968) 23, 24

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Healy v. Edwards, 363 F. Supp. 1110 (E.D. La. 1973), *juris. statement filed*, 42 U.S.L.W. 3307 (Nov. 12, 1973) 12, 13, 17
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La Fleur v. Cleveland Board of Education, 465 F.2d 1185 (6th Cir. 1972), *cert. granted* 411 U.S. 947 (1973) 9
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New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973) 27

Quong Ham Wah Co. v. Industrial Accident Comm'n, 184 Cal. 26, 192 P. 1021 (1920), *app. dism.*, 255 U.S. 445 (1921) 29

Reed v. Nebraska School Activities Ass'n, 341 F. Supp. 258 (D. Neb. 1972) 9
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Reed v. Reed, 404 U.S. 71 (1971) 8, 9, 10, 17, 23
Richardson v. Davis, 409 U.S. 1069 (1972), *aff'g* 342 F. Supp. 588 (D. Conn. 1972) 27
Richardson v. Griffin, 409 U.S. 1069 (1972), *aff'g* 346 F. Supp. 1226 (D. Md. 1972) 27
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Yale & Towne Mfg. Co. v. Travis, 262 F. 576 (S.D.N.Y. 1919), *aff'd*, 252 U.S. 60 (1920) 29

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29 C.F.R. §1604.9(a) 18
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5 U.S.C. §8101(11) 20
5 U.S.C. §8110 20
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State Statutes:

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Fla. Laws 1895, c. 4322, §4(7) 7
Fla. Stat. §1.01(2) 25
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Fla. Stat. §192.06(7) (1941), *as noted in* Fla. Laws 1943, c. 21742, §1(7), *amended by* Fla. Laws 1969, c. 69-55, §§1, 2 and *renumbered* Fla. Stat. §196.191 (7) 8
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Fla. Stat. §196.191(7) (1969) *repealed by* Fla. Laws 1971, c. 71-133, §15 and *replaced by* Fla. Stat. §196.-202, Fla. Laws 1971, c. 71-133, §12 ..... 8, 24, 25, 31
Fla. Stat. §196.202 *replacing* §196.191(7), *added by* Laws 1971, c. 71-133, §12, effective December 31, 1971 2

Other Authorities:

Ferriss, Indicators of Trends in the Status of American Women 103 (1971) 7
Galbraith, Kuh and Thurow, *The Galbraith Plan to Promote the Minorities*, N.Y. Times, Aug. 22, 1971 (Magazine) at 9 24
Grimke, Letters on the Equality of the Sexes and the Condition of Women; Addressed to Mary Parker, President of the Boston Female Anti-Slavery Society 10 (1838) 16
Gunther, *The Supreme Court, 1971 Term, Forward: A Model for a Never Equal Protection*, 86 Harv. L. Rev. 34 (1972) 9
Note, *Pregnancy Discharges in the Military: The Air Force Experience*, 86 Harv. L. Rev. 568 (1973) 9

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Johnston & Knapp, *Sex Discrimination by Laws: A Study in Judicial Perspective*, 46 N.Y.U.L. Rev. 675 (1971) 8, 16

N.Y. Times, Mar. 19, 1973, p. 40, col. 1 7

Occupation by Industry, PC-7C 1970 7

Sex Discrimination Guidelines, 29 C.F.R. §§1604.1-1604.10 18

U.S. Bureau of Census, Census of Population: 1970, Detailed Characteristics, Final Report PC(1)-D11 Florida, October, 1972, at 679-80 30

U.S. Bureau of Labor Statistics, Dept. of Labor, Employment and Earnings 34-35 (May 1971) 6

U.S. Women's Bureau, Dept. of Labor, Bull. No. 294, Handbook of Women Workers 39 (1969) 6

U.S. Women's Bureau, Dept. of Labor, Why Women Work 1 (rev. ed. June 1973) 6

Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968) 14

Waldman, *Changes in the Labor Force Activity of Women*, 93 Monthly Labor Rev. 10 (June 1970) 6-7

IN T

Supreme Court of

OCTOBER TE**United States**

No. 7:973

MEL KAH

—v.—,

Appellants,

ROBERT L. SH

et al.,

ON APPEAL FROM THE *Appellees.*

THE STATE C

EME COURT OF

BRIEF FOR ARIDA

LANTS

Opinions

The opinion of the Supreme C**w**
is reported at 273 So.2d 72.
Court, 11th Judicial District, **J**of the State of Florida
reported. Copies of both opi**n**opinion of the Circuit
Appendix to the Jurisdictional**S**County, Florida, is un-
are set forth in the

Jurisdiement (J.S. at A1-A7).

On February 7, 1973, the S
of Florida entered the judgm
this appeal. Notice of Appea
the United States was filed in t**h**ne Court of the State
on May 4, 1973 (A. 17a). The **w**hich is the subject of
the Supreme Court of
preme Court of Florida
lictional Statement was

filed on July 6, 1973, and probable jurisdiction was noted on October 23, 1973.

The jurisdiction of the Supreme Court to review this decision of the Supreme Court of Florida on appeal is conferred by Title 28 U.S.C., Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *In re Gault*, 387 U.S. 1 (1967); *Loving* v. *Virginia*, 388 U.S. 1 (1967); *Levy* v. *Louisiana*, 391 U.S. 68 (1968).

Statutes Involved

Florida Statute §196.191(7) provides:[1]

[1] Fla. Stat. §196.191 was repealed by Laws 1971, c. 71-133, §15, effective December 31, 1971. Section 196.202, replacing §196.191 (7), was added by Laws 1971, c. 71-133, §12, effective December 31, 1971. Section 196.202 reads:

> 196.202 Property of widows, blind persons, and persons totally and permanently disabled
>
> Property to the value of five hundred dollars ($500) of every widow, blind person, or totally and permanently disabled person who is a bona fide resident of this state shall be exempt from taxation.

The Florida Constitution sets forth the basis for this property tax exemption:

Article IX, Section 9 of the 1885 Florida Constitution provided:

> . . . [T]here shall be exempt from taxation property to the value of five hundred dollars to every widow *and* to every person who is a bona fide resident of this state, and has lost a limb or been disabled in war or misfortune.

The provisions of former Article IX, Section 9 of the 1885 Florida Constitution, were incorporated in its successor, Article VII, Section 3(b) of the 1968 Florida Constitution, which provides:

> There shall be exempt from taxation, cumulatively, to every head of a family residing in this state, household goods and personal effects to the value fixed by general law, not less than one thousand dollars, and to every widow or person who is blind or totally and permanently disabled, property to the value fixed by general law not less than five hundred dollars.

A widow is entitled to exempt $500 yearly from her property tax. Other persons entitled to exempt $500 include: those who have lost a limb or become disabled in war, by military hostilities or by misfortune and are residents of the state.

Question Presented

Whether Fla. Stat. §196.191(7), which provides that widows are entitled to a property tax exemption of up to $500, but makes no provision for men similarly situated, denies appellant, a widower, the equal protection of the laws.

Statement of the Case

Appellant Mel Kahn is a widower who resides in Florida. He applied, in January, 1971, to the Dade County Tax Assessor's office for a $500 property tax exemption under Fla. Stat. §196.191(7). That statute provides a property tax exemption for widows, but does not specify a similar exemption for widowers. Widower Kahn was denied the tax exemption.

Appellant then sought declaratory relief in the Circuit Court for Dade County, Florida; he argued that §196.191(7) is unconstitutional as a violation of the equal protection clause of the fourteenth amendment to the United States Constitution and Art. 1, §2, Declaration of Rights, Florida Constitution, 1968, insofar as widowers are denied the exemption accorded widows. The Circuit Court held that §196.191(7), as it applies to the female gender only, is "discriminatory and arbitrary and unconstitutional" under the equal protection clause of the fourteenth amendment

to the United States Constitution (J.S. at A3). On defendants' appeal, the Supreme Court of Florida reversed, holding §196.191(7) a valid legislative enactment. 273 So. 2d at 74 (J.S. at A7).

Summary of Argument

I.

Fla. Stat. §196.191(7), providing a property tax exemption of up to $500 to all Florida widows, but not widowers, denies appellant the equal protection of the law guaranteed by the fourteenth amendment.

Historically, women have been treated as subordinate and inferior to men. Although discrimination against women persists and equal opportunity has by no means been achieved, women simultaneously have been placed on a pedestal and given special benefits. Both discrimination against, and special benefits for, women stem from stereotypical notions about their proper role in society.

Special benefits for women such as the tax exemption here at issue result in discriminatory treatment of similarly situated men, themselves victims of male sex-role stereotypes. Absent firm constitutional foundation for equal treatment of men and women by the law, individuals seeking to be judged on their own merits will continue to encounter law-sanctioned obstacles.

II.

The distinction between widows and widowers established by Fla. Stat. §196.191(7) creates an "invidious classification" requiring close judicial scrutiny. Although the

legislature may distinguish between individuals on the basis of their need or ability, it is presumptively impermissible to distinguish on the basis of an unalterable identifying trait over which the individual has no control and for which he or she should not be disadvantaged by the law.

III.

Upon finding that the sex-based classification in Fla. Stat. §196.191(7) violates the fourteenth amendment, this Court should remand to the court below for consideration whether, consistent with the dominant legislative purpose, the constitutional infirmity should be remedied by holding the exemption available to all widowed property owners.

ARGUMENT

I.

The gender-based classification in Fla. Stat. §196.191 (7), established for a purpose unrelated to any biological difference between the sexes, constitutes an invidious discrimination in violation of the equal protection clause of the fourteenth amendment.

A. *The Challenged Classification Is Based on a Stereotype That Lacks Correspondence With Reality for Millions of Families in the United States.*

The classification embodied in Fla. Stat. §196.191(7), granting property tax exemptions to widows but not to widowers, reflects a familiar stereotyping of sex roles: a woman left alone by the death of her husband is thought economically disabled; a man is believed to suffer scant financial loss upon the death of his wife, and even to be relieved of the burden of supporting her.

The division of the widowed population into two distinct classes, self sufficient men and disabled women, is hardly tenable in this latter half of the twentieth century. Widowhood may have a devastating impact on a man whose age disqualifies him from pursuing economic opportunities, and who must cope with loss of myriad services once performed for him by his spouse. On the other hand, many women, during marriage, are self supporting and may contribute importantly to the support of their families. Hardly atypical is the older couple with a wife in good health who assumes financial responsibility for an ailing husband. Moreover, widowed women do not constitute a clear economic class. On the contrary, the Florida population undoubtedly includes a substantial number of affluent widows who need a tax exemption far less than widowers of limited means.

In short, Fla. Stat. §196.191(7) reflects a stereotypical view of the economic roles of men and women which does not correspond with reality for millions of persons in the United States. In April, 1971, approximately 32 million women, 42.7% of all women 16 years of age or older, were in the labor force, compared with 28.9% in March, 1940. U.S. Bureau of Labor Statistics, Dept. of Labor, Employment and Earnings 34-35 (May 1971). By 1973, more than 33 million women were in the labor force; of these women, 19.25 million, or 58.5% of working women, were married and living with their husbands. U.S. Women's Bureau, Dept. of Labor, Why Women Work 1 (rev. ed. June 1973). This is almost twice the rate of 1940. U.S. Women's Bureau, Dept. of Labor, Bull. No. 294, Handbook of Women Workers 39 (1969). From 1960 to 1970, nearly half of the increase in the labor force was accounted for by married women. Waldman, *Changes in the Labor Force Activity of Women,* 93

Monthly Labor Rev. 10, 11 (June 1970). And in recent years, married women have made up the largest portion of the annual increase in the civilian labor force. Waldman & Young, *Marital and Family Characteristics of Workers*, 94 Monthly Labor Rev. 46 (March 1971). Married women of all ages are increasing their rate of labor force participation while other groups are not. A. Ferriss, Indicators of Trends in the Status of American Women 103 (1971). In well over 40% of families where both spouses were present, both were employed. *Id.* at 95.

Moreover, despite the discrimination against women workers still characteristic of the labor market, many married women earn more than their husbands. The Census Bureau reports that in 1970, wives earned more than husbands in 3.2 million or 7.4% of American families. *See* N.Y. Times, Mar. 19, 1973, at 40, col. 1. The 1970 Census also reveals that women accounted for two-thirds of the increase in total employment in the 1960's and for half or more of the gain in certain jobs, ranging from bookkeeping to bartending. *See* Occupation by Industry, PC-7C, 1970.

It may be that decades ago Florida's widow's exemption did correlate "fairly and substantially" with the ability of women property owners to pay taxes. In 1892, the exemption was applicable only to the "widow dependent on her own exertions, that has a family dependent upon her for support." [2]

By the turn of the century, the dependent family requirement was dropped, but the exemption remained conditioned on the widow's "dependen[ce] upon her own exertions." [3]

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[2] Fla. Const. art. IX, §9 (1885); Fla. Laws 1891, c. 4010, §4(7), p. 2.

[3] Fla. Laws 1895, c. 4322, §4(7), p. 4.

Since 1941, the exemption has been available, without qualification, to "every widow."[4]

In light of the significant changes in women's opportunities for and pursuit of gainful employment in the course of this century, the progression from needy widow to any widow, and continued exclusion of widowers, defies rational explanation.

B. *The Equal Protection Clause of the Fourteenth Amendment Does Not Tolerate Legislative Line-Drawing on the Basis of Sex Stereotypes.*

In 1971, this Court, departing from a century old decisional course,[5] declared constitutionally impermissible a classification similar to the one challenged here. In *Reed* v. *Reed*, 404 U.S. 71 (1971), the Court invalidated an Idaho statute that preferred men over women for appointment as estate administrators. The statutory preference was based on the stereotypical assumption that men have more business experience than women. *Reed* v. *Reed*, 93 Idaho 511, 514, 465 P.2d 635, 638 (1970). Explicitly repudiating one-eyed sex role thinking as a predicate for legislative distinctions, this Court held in *Reed:*

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[4] Constitutional development: Fla. Const., art. IX, §9 (1885), *as amended*, general election 1940 (Amendment of 1940 proposed by Fla. Laws 1939, H.J.R. No. 375, p. 1666); Fla. Const. art. VII, §3 (1968). Statutory development: Fla. Stat. §192.06(7) (1941), *as noted in* Fla. Laws 1943, c. 21742, §1(7), p. 154; *amended by* Fla. Laws 1969, c. 69-55, §§1, 2, p. 240 and *renumbered* Fla. Stat. §196.191(7); Fla. Stat. §196.191(7) (1969) *repealed by* Fla. Laws 1971, c. 71-133, §15, p. 409 and *replaced by* Fla. Stat. §196.202, Fla. Laws 1971, c. 71-133, §12, p. 408.

[5] *Bradwell* v. *Illinois*, 83 U.S. (16 Wall.) 130 (1873); *Minor* v. *Happersett*, 88 U.S. (21 Wall.) 162 (1874); *Muller* v. *Oregon*, 208 U.S. 412 (1908); *Goesaert* v. *Cleary*, 335 U.S. 464 (1948); *Hoyt* v. *Florida*, 368 U.S. 57 (1961); *see generally* Johnston & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U.L. Rev. 675 (1971).

> [The statute] provides that different treatment be accorded to the applicants on the basis of their sex; it thus establishes a classification subject to scrutiny under the Equal Protection Clause. 404 U.S. at 75.

Recognizing that the governmental interest urged to support the Idaho statute was "not without some legitimacy," 404 U.S. at 76, the Court nonetheless termed "arbitrary" the major premise of the Idaho court, and found the legislation constitutionally infirm because it provided "dissimilar treatment for men and women who are . . . similarly situated." 404 U.S. at 77.

Reed was assessed by both courts[6] and commentators[7] as a sign of fundamental change in this Court's perspective with regard to gender-based classifications. It was apparent that the Court had departed significantly from the traditional equal protection analysis familiar in review of social and economic legislation. Sex-based distinctions

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[6] *See Brenden* v. *Independent School District*, 477 F.2d 1292 (8th Cir. 1973); *Eslinger* v. *Thomas*, 476 F.2d 225 (4th Cir. 1973); *Green* v. *Waterford Board of Education*, 473 F.2d 466 (10th Cir. 1972), *cert. denied*, 412 U.S. 906 (1973); *La Fleur* v. *Cleveland Board of Education*, 465 F.2d 1185 (6th Cir. 1972), *cert. granted* 411 U.S. 947 (1973); *Lamb* v. *Brown*, 456 F.2d 18 (10th Cir. 1972); *Heath* v. *Westerville Board of Education*, 345 F. Supp. 501 (S.D. Ohio 1972); *Reed* v. *Nebraska School Activities Ass'n*, 341 F. Supp. 258 (D. Neb. 1972); *Williams* v. *San Francisco Unified School District*, 340 F. Supp. 438 (N.D. Calif. 1972); *Robinson* v. *Rand*, 340 F. Supp. 37 (D. Colo. 1972); *Shull* v. *Columbus Municipal Separate School District*, 338 F. Supp. 1376 (N.D. Miss. 1972); *Bray* v. *Lee*, 337 F. Supp. 934 (D. Mass. 1972); *Matter of Patricia A.*, 31 N.Y.3d 83, 335 N.Y.S.2d 33 (1972).

[7] Gunther, *The Supreme Court, 1971 Term, Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 34 (1972); Note, *Pregnancy Discharges in the Military: The Air Force Experience*, 86 Harv. L. Rev. 568, 583-88 (1973).

were to be subject to "scrutiny," a word until *Reed* typically reserved for race discrimination cases where the term was accompanied by the requirement that the legislation meet a "compelling state interest" standard. "Traditional" equal protection rulings, by contrast, mandate judicial tolerance of a legislative classification unless "patently arbitrary": "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland*, 366 U.S. 420, 426 (1961). *See also Jefferson* v. *Hackney*, 406 U.S. 535, 546 (1972); *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970).

On May 14, 1973, in *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), this Court made explicit the incurable flaw in governmental schemes that treat males and females differently solely on the basis of gender, schemes that rest upon stereotypical judgments concerning distinct roles for men and women. In *Frontiero*, a statutory presumption that husband is breadwinner, wife dependent, was declared a constitutionally impermissible means of determining entitlement to government benefits. 411 U.S. at 681. Four members of the Court, in a plurality opinion written by Mr. Justice Brennan, declared gender classifications subject to strict judicial scrutiny:

> [S]ince sex, like race and national origin, is an immutable characteristic determined solely by accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . . ." *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972). And what differentiates sex from such nonsuspect statuses

> as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or to contribute to society. 411 U.S. at 686.

The 8-1 judgment in *Frontiero* invalidated a fringe benefit scheme that awarded male members of the military housing allowances and medical care for their wives, regardless of dependency, but authorized benefits for female members only if they in fact supported their husbands. The differential at issue in the case at bar is sharper than the one held unconstitutional in *Frontiero*. There, husband qualified if wife supplied more than half his support. Here, under no circumstances may a man qualify for the exemption.

The message of *Frontiero* is clear: persons similarly situated, whether male or female, must be accorded even-handed treatment by the law; lump treatment of men, on the one hand, and women on the other is constitutionally impermissible. Legislative classifications may legitimately take account of need or ability; they may not be premised on sex-role stereotypes or unalterable sex characteristics that bear no necessary relationship to an individual's need, ability or life situation.[8] Recently, the Solicitor General, speaking for the United States and all its agencies, expressed with precision the significance of the *Reed-Frontiero* development (Memorandum for the United States as *Amicus Curiae* at 8, *Cohen* v. *Chesterfield County*

[8] Enlightened judges in state courts take a similar view of gender-based classifications. *See*, e.g., *Sail'er Inn* v. *Kirby*, 5 Cal. 3d 1, 485 P.2d 529 (1971), a unanimous decision of the California Supreme Court explicitly denominating sex a suspect classification.

School Board and *Cleveland Board of Education* v. *La Fleur*, in U.S.S.C. Nos. 72-777 and 72-1129, filed October, 1973):

> It is now settled that the Equal Protection Clause of the Fourteenth Amendment . . . does not tolerate discrimination on the basis of sex. *Frontiero* v. *Richardson*, 411 U.S. 677 (1973); *Reed* v. *Reed*, 404 U.S. 71 (1971).[9]

While instances of discrimination against women dominate the growing body of case law, the constitutional mandate is equally applicable to men. For, as *Frontiero* graphically illustrates, gender-based discrimination frequently impacts adversely on both sexes. Laws defining women as a dependent class reinforce societal attitudes that "separate but equal" is a concept appropriately applied to men and women. Women as workers may be denied equal opportunities and fringe benefits because in the world outside the home they are regarded as secondary. As "compensation," women are recognized as

[9] *Accord*, *Smith* v. *City of East Cleveland*, 363 F. Supp. 1131 (N.D. Ohio 1973) (minimum height and weight requirements for municipal police officers discriminate invidiously on the basis of sex); *Healy* v. *Edwards*, 363 F. Supp. 1110 (E.D. La. 1973) (three-judge court), *juris. statement filed*, 42 U.S.L.W. 3307 (Nov. 12, 1973) (exemption of women from jury service held unconstitutional); *Bowen* v. *Hackett*, 361 F. Supp. 854 (D.R.I. 1973) (dependent child allowance must be furnished disabled and unemployed men and women on the same basis); *Ballard* v. *Laird*, 360 F. Supp. 643 (S.D. Calif. 1973) (three-judge court) (Navy must grant commissioned servicemen same tenure legislatively guaranteed to servicewomen); *Aiello* v. *Hanson*, 359 F. Supp. 792 (N.D. Calif. 1973) (three-judge court), *juris. statement filed sub nom. Geduldig* v. *Aiello*, 42 U.S.L.W. 3247 (Oct. 12, 1973) (employees disabled by pregnancy-related condition entitled to compensation from state insurance fund under same terms and conditions as those applicable to all other disabled employees).

principal caretakers of home and children and therefore as financially disabled.

In *Stanley* v. *Illinois*, 405 U.S. 645 (1972), this Court emphasized the fundamental unfairness to men as well as women of legislative lines based on sex stereotypes. Unwed fathers, the Court ruled, may not be deprived of custody absent a hearing of the same quality accorded unwed mothers and wed parents. Acknowledging that "[i]t may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents," this generalization is not true of *all* unwed fathers. 405 U.S. at 654. Consequently, the legislative presumption was impermissible, despite its convenience and its correspondence to reality in perhaps the majority of cases.

Similarly, lower courts have rejected disadvantageous treatment of men unsupported by strong affirmative justification. *E.g., Moritz* v. *Commissioner of Internal Revenue*, 469 F.2d 466 (10th Cir. 1972), *cert. denied*, 412 U.S. 906 (1973) (never-married man declared entitled to parent-care tax deduction provided by Congress for never-married women); *Healy* v. *Edwards*, 363 F. Supp. 1110, 1113-14 (E.D. La. 1973) (three-judge court), *juris. statement filed*, 42 U.S.L.W. 3307 (Nov. 12, 1973) (rejecting jury service exemption for women as inconsistent with "[t]he minimum requirement of Equal Protection" that "dissimilar treatment may no longer constitutionally be provided for men and women who are similarly situated *with respect to the objectives of the legislation*") (emphasis by the court); *Ballard* v. *Laird*, 360 F. Supp. 643 (S.D. Calif. 1973) (three-judge court) (whether the discrimination favors the female or the male is irrelevant in utilizing the teaching of *Frontiero*—cost of granting male officers same

13 year guaranteed tenure as female officers does not justify infringement of the constitutional guarantee); *Lamb* v. *Brown*, 456 F.2d 18 (10th Cir. 1972) (16 (male)/18 (female) sex/age differential for juvenile offender treatment discriminates unconstitutionally against men).

Nor does the provision here at issue enjoy special immunity from constitutional scrutiny because tax exemption is a matter of "legislative grace." For it is now beyond debate that "[a] minimum demand of uniformly reasonable rules in the management of public largess is surely an unexceptional requirement of constitutional government." Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439, 1461 (1968); *see Shapiro* v. *Thompson*, 394 U.S. 618, 627 n. 6 (1969).

Two cases, closely analogous to the one at bar, underscore the point: *In re Estate of Legatos*, 1 Cal. App. 3d 657, 91 Cal. Rptr. 910 (1969); *Moritz* v. *Commissioner of Internal Revenue, supra.* In *Estate of Legatos*, the court declared inconsistent with equal protection an inheritance tax imposed on certain property when devised by husband to wife but not when devised by wife to husband:

> Equality of burden is a fundamental principle of taxation. Equal protection demands that similar property be taxed by the same yardstick to those similarly situated. . . . Both in their incidence and innate characteristics tax moneys are sexless and soulless. 1 Cal. App. 3d at 661, 662, 81 Cal. Rptr. at 913.

The court also noted that "[a]dministrative convenience such as preventing loss of revenue to the state is not

a valid basis for classification." 1 Cal. App. 3d at 662, 81 Cal. Rptr. at 913.

In *Moritz*,[10] the Court of Appeals for the Tenth Circuit concluded that a tax classification "premised primarily on sex" constituted an "invidious discrimination." 469 F.2d at 470. In sharp contrast to the Florida Supreme Court's assertion that because "women workers as a class do not earn as much as men" a widows-only tax exemption has a "fair and substantial relation" to a permissible legislative objective, 273 So.2d at 73, the Tenth Circuit reasoned:

> If Congress had desired to give relief to persons in low income brackets . . . means were available through classifications geared to such objectives without using the invidious discrimination based solely on sex. *Cf., Stanley* v. *Illinois*, 405 U.S. 645, 656, 657. 469 F.2d at 470.

In sum, denial to widowers of the property tax exemption granted widows cannot survive constitutional review. Exclusion of widowers, based solely on their sex, reflects arbitrary and stereotypical notions of the differences between women and men, is wholly unrelated to any biological difference between the sexes, and is not fairly and substantially related to individual need.

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[10] Cited with apparent approval in *Frontiero* v. *Richardson*, 411 U.S. 677, 691 n. 25 (1973).

C. *Gender Classification as a Proxy for Some Other Individual or Social Characteristic, Such as Physical or Economic Capability or Need, Once Regarded as Favorable to or Protective of Women Is Now Recognized as Ultimately Harmful to Them.*

The court below, citing *Hoyt* v. *Florida,* 368 U.S. 57 (1961), concluded that gender classifications are permissible "for the purpose of according a privileged status to women." 273 So.2d at 73 n. 3. In fact, *Hoyt,* is a classic example of the invidious effect of classifications once thought by well-intentioned jurists to operate "benignly" in women's favor. *See* Johnston & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective,* 46 N.Y.U.L. Rev. 675, 708-21 (1971).

Hoyt upheld the constitutionality of a Florida statute limiting service of women on juries to volunteers. The limitation was considered reasonable because "woman is still regarded as the center of home and family life." 368 U.S. at 62. Hence, she was entitled to "favored" treatment, indeed, the best of both worlds: the right to serve for the asking, immunity from responsibility if she preferred not to serve.

Decisions in the wake of *Hoyt* demonstrate that favors of this kind come at an exorbitant price.[11] *See* Motion to Affirm, *Edwards* v. *Healy,* U.S.S.C. Docket No. 73-759 (December, 1973). For example, in a 1970 decision, a New York trial court rejected the challenge of a female plaintiff to a jury system with automatic exemption for women. As a

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[11] *Cf.* S. Grimke, Letters on the Equality of the Seves and the Condition of Women; addressed to Mary Parker, President of the Boston Female Anti-Slavery Society 10 (1838):

> We ask no favors for our sex. All we ask of our brethren is that they take their feet off our necks . . . .

result of this exemption, women constituted less than twenty percent of the available pool. In his published opinion, the judge relied on *Hoyt* to explain to the complainant that she was "in the wrong forum." Accurately reflecting the impact of laws "for women only," the judge stated that plaintiff's "lament" should be addressed to her sisters who prefer "cleaning and cooking, bridge and canasta, the beauty parlor and shopping, to becoming embroiled in plaintiff's problems . . . ." *De Kosenko* v. *Brandt*, 63 Misc.2d 895, 898, 313 N.Y.S.2d 827, 830 (Sup. Ct. 1970). *See also Goldblatt* v. *Board of Education*, 52 Misc.2d 238, 275 N.Y.S.2d 550 (1966), *aff'd*, 57 Misc.2d 1089, 294 N.Y.S.2d 272 (Sup. Ct. 1968) (regulation authorizing full salary less jury fees for male, but not female, teachers was "reasonable" because a woman could avoid jury duty by claiming exemption).

The implications of *Hoyt* were better understood by the three-judge federal district court in *Healy* v. *Edwards*, *supra*. Recognizing that *Reed* had eroded, and *Frontiero* crevassed the foundation of *Hoyt*, the court reasoned:

> When today's vibrant principle is obviously in conflict with yesterday's sterile precedent, trial courts need not follow the outgrown dogma. Hence we consider that *Hoyt* is no longer binding. 363 F. Supp. at 1117.

Other "favors" once accorded women by chivalrous or paternalistic legislatures have undergone similar reassessment. Thus, the indeterminate sentence for women, subjecting them to potentially longer prison terms than men, has been recognized as an invidious classification, despite the favor it bestowed: early release for females who

promptly reformed under the special supervision accorded them. *See U.S. ex rel. Robinson* v. *York,* 281 F. Supp. 8 (D. Conn. 1968); *New Jersey* v. *Chambers,* 36 N.J. 287, 307 A.2d 78 (1973); *Commonwealth* v. *Daniel,* 430 Pa. 642, 243 A.2d 400 (1968); *Commonwealth* v. *Stauffer,* 211 Pa. Super. 113, 251 A.2d 718 (1969); *Liberti* v. *York,* 28 Conn. Supp. 9, 246 A.2d 106 (1968).

In contrast to the assumption of the court below that distinct classification of widows and widowers assists women to achieve equality, administrators and courts charged with implementation of national fair employment policy recognize that special treatment of women perpetuates sex stereotypes and thereby retards women's access to equal opportunity in economic life. Thus, Sex Discrimination Guidelines, 29 C.F.R. §§1604.1-1604.10, issued by the Equal Employment Opportunity Commission pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.,* provide:

> It shall be an unlawful employment practice for an employer to make available benefits for the wives and families of male employees where the same benefits are not made available for the husbands and families of female employees . . . . 29 C.F.R. §1604.9(d).
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> • • • • •
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> It shall be an unlawful employment practice for an employer to have a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex, or which differentiates in benefits on the basis of sex. 29 C.F.R. §1604.9(f).

These Guidelines, issued in 1972 and applicable to state and municipal employment as well as to the private sector,

reflect consistent administrative and judicial interpretation of Title VII. For example, in 1969, the Equal Employment Opportunity Commission found reasonable cause to believe that Title VII was violated by a death benefit plan providing an automatic pension for widows of male employees, but no pension for widowers of female employees unless physically or mentally incapable of self-support. "Title VII of the Civil Rights Act of 1964," the Commission stated, "is intended to protect *individuals* from the penalizing effects of . . . presumptions based on the collective characteristics of a sexual group." EEOC Decisions, Case No. YNY9-034, CCH Emp. Practices Guide ¶6050 (June 16, 1969). (Emphasis in the original.) For court confirmation of the principle underlying this EEOC decision, *see Rosen* v. *Public Service Elec. & Gas Co.*, 477 F.2d 90 (3rd Cir. 1973) (Title VII violated by pension arrangement allowing women to retire earlier on full pension); *Diaz* v. *Pan American World Airways*, 442 F.2d 385 (5th Cir. 1971) (invalidating a ban on hiring male flight attendants); *Hays* v. *Potlatch Forests, Inc.*, 465 F.2d 1081 (8th Cir. 1972) (reconciling state law with Title VII by extending premium overtime law to men).

The insistence on equal benefits for men and women, husbands and wives, widowers and widows evident in Title VII administration is also a feature of other legislation designed to eradicate sex-based discrimination.[12] For ex-

[12] Similarly, administrators of Executive Orders designed to promote equal employment opportunity target elimination of sex-role stereotypes as the essential task. *See, e.g.*, H.E.W. Higher Education Guidelines, issued pursuant to Executive Order 11246, 3 C.F.R. 418 (1965), as amended by Executive Order 11375, 32 Fed. Reg. 14303 (1968), at 13 (Oct. 1, 1972) (child care leave should be available to men and women on an equal basis).

ample, in December, 1971, Congress amended §2108 of Title 5 of the United States Code "to provide equality of treatment for married women federal employees with respect to (veteran's) preference, eligible employment benefits, cost of living allowances in foreign areas, and regulations concerning marital status generally . . . ." P.L. 92-187, 85 Stat. 644. This legislation, covering all employees of the federal government except members of the uniformed services, added the following subparagraph to 5 U.S.C. §7152:

> (c) Notwithstanding any other provision of law, any provision of law providing a benefit to a male Federal employee or to his spouse or family shall be deemed to provide the same benefit to a female Federal employee or to her spouse or family.

This provision had the following effects: (a) It equalized the tests under 5 U.S.C. §8133 for payment of death benefits to widows and widowers of federal employees dying from injury sustained in the performance of duty. Previously, widows were entitled to benefits if they were "living with or dependent for support on the decedent at the time of his death or living apart for reasonable cause or because of desertion." 5 U.S.C. §8101(6). A widower, however, was entitled to benefits only if, "because of physical or mental disability, [he] was wholly dependent for support on the employee at the time of her death." 5 U.S.C. §8101(11). (b) It equalized the tests under 5 U.S.C. §8110 for payment of augmented compensation to spouses of disabled federal employees. Previously, a wife was eligible for augmented compensation if she lived in the same household as the employee or received regular contributions from

him, or if he was under court order to contribute to her support. A husband was eligible for augmented compensation only if he was wholly dependent on the employee for support because of physical or mental disability.

In January, 1971, Congress amended 5 U.S.C. §8341[13] which defines persons qualified for Federal Civil Service survivor's annuities. A surviving widow qualified automatically, but a surviving widower qualified only if he was incapable of self-support because of mental or physical disability and received more than half his support from his wife. The amendment gave widowers the same automatic qualification as widows. The House Committee Report states the reasons for the amendment:

> In the Committee's judgment, the present provision is discriminatory in that it runs counter to the facts of current-day living, whereby the woman's earnings are significant in supporting the family and maintaining its standards of living. Accordingly, the bill removes the dependency requirements applicable to surviving widowers of female employees, thus according them the same treatment accorded widows of deceased male employees. H.R. Rep. No. 91-1469, 91st Cong., 2d Sess., 1970 U.S. Code Cong. & Ad. News, Vol. III, 5931, 5934.

In December, 1971, Congress amended 5 U.S.C. §2108,[14] which defines persons eligible for veterans preference in the federal civil service. Previously, the "unmarried widow," but not the unmarried widower, of a veteran, and "the

[13] P.L. 91-658, 84 Stat. 1961.

[14] P.L. 92-187, 85 Stat. 644.

wife," but not the husband, of "a service-connected disabled veteran" meeting certain other requirements were eligible. The amendment made widowers and husbands eligible under the same conditions as widows and wives.

In the same act, Congress amended 5 U.S.C. §5924, which provides cost of living allowances to dependents of federal employees living in a foreign area. The allowance, previously payable to "the employee's wife or his dependents, or both," was made payable to "the employee's spouse or dependents, or both."

In October, 1972, Congress amended 38 U.S.C. §102(b) which defines the term "dependent" for the purpose of determining the amount of the education assistance allowance armed forces veterans are eligible to receive.[15] A veteran with dependents, as defined, is eligible for a substantially higher allowance.[16] Section 102(b) previously provided that the wife of a male veteran was automatically classified as a dependent while the husband of a female veteran was classified as dependent only if he "is incapable of self-maintenance and is permanently incapable of self-support due to mental or physical disability . . . ." The amendment redefines "dependent" to include all husbands of eligible female veterans without regard to incapacity or dependency. And on July 9, 1973, 37 U.S.C. §401 was amended to eliminate the differential at issue in *Frontiero*.[17]

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[15] P.L. 92-540, 86 Stat. 1074.

[16] 38 U.S.C. §1682.

[17] P.L. 93-64, 87 Stat. 147. Although the effective date of the statute is July 1, 1973, the Comptroller General has declared the *Frontiero decision fully retroactive*. 53 Comp. Gen. —— (B 178979, Aug. 31, 1973).

Before amendment, the provisions cited above imposed a test of actual dependency for husbands or widowers, but authorized benefits for wives or widows regardless of dependency. The change in each case was to extend to husbands or widowers the automatic benefits already enjoyed by wives or widows. The "administrative convenience" of prior arrangements was rejected as a justification for differentials in benefits. Rather, the prior arrangements were recognized as "discriminatory" and inconsistent with "the facts of current-day living."

Although aware that "steps have been . . . taken toward the elimination of legal barriers to equality of the sexes," 273 So.2d at 73, the court below found support for its decision in *Gruenwald* v. *Gardner*, 390 F.2d 591 (2d Cir.), *cert. denied*, 393 U.S. 982 (1968). *Gruenwald* found no constitutional infirmity in a statutory scheme that accorded women more favorable treatment than men in computing social security benefits upon retirement at age 62.

But if *Hoyt* represents sterile precedent, *Gruenwald* must be regarded as similarly stripped of vitality. *Gruenwald* antedated *Reed*, *Stanley*, and *Frontiero*. When *Gruenwald* was presented to the Second Circuit, that court had as its guide an unbroken line of this Court's decisions sanctioning legislation that drew "a sharp line between the sexes." [18] Post-*Reed*, the Second Circuit promptly signalled its willingness to examine gender classifications from the new perspective. *See Green* v. *Waterford Board of Education*, 473 F.2d 629 (2d Cir. 1973). And indicative of height-

[18] *Goesaert* v. *Cleary*, 335 U.S. 464, 466 (1948). *See* cases cited note 2 *supra*.

ened public consciousness of the invidious character of sex-based distinctions, Congress has eliminated the *Gruenwald* differential. The more favorable computation once reserved for women has been extended to men. 42 U.S.C. §414 (Supp. 1972), *amending* 42 U.S.C. §414.

Moreover, the distinction approved in *Gruenwald* had at least a tenuous relationship to discrimination encountered by women in the labor market. The benefit calculation applied to amounts earned by women; it was thus linked in an arguably direct way to disparities in salary and promotion opportunities for male and female wage earners. In the case at bar, on the other hand, the tax exemption is not tied in any way to discrimination encountered by women in economic activity. Totally unrelated to the needs or economic capabilities of widows, it is available on the same terms to the heiress who has never engaged in gainful employment and to the woman who has functioned as her family's sole breadwinner.

In sum, the *noblesse oblige* to "the weaker sex" exhibited by the court below does not aid women to achieve equality[19] and discriminates unfairly against men. In particular, Fla. Stat. §196.191(7) perpetuates the myth that widows cannot, without assistance, make financial ends meet, but widowers can. Far from having any substantial

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[19] Generalized provisions based on gender stereotypes of the variety here at issue must be distinguished from affirmative action measures tailored narrowly and specifically to rectify the effects of past discrimination against women in a particular setting. Such measures deal directly with economic and social conditions that underlie and support a subordinate status for women. *See, e.g.*, H.E.W. Higher Education Guidelines, *supra* note 12; Galbraith, Kuh and Thurow, *The Galbraith Plan to Promote the Minorities*, N. Y. Times, Aug. 22, 1971 (Magazine) at 9.

relationship to a legitimate state interest, the classification at issue reflects stereotypical attitudes toward the roles of married men and women, hence, the financial status of widowers and widows. One-eyed sex-role thinking of this kind no longer accords with reality for a substantial and growing portion of the population.

II.

Upon determining that the gender-based classification in Fla. Stat. §196.191(7) violates the fourteenth amendment, this Court should remand to the court below for consideration whether, consistent with the dominant legislative purpose, the constitutional infirmity should be remedied by holding the exemption available to all widowed property owners.

Both the trial court and the Supreme Court of Florida acknowledged the obvious point that when the legislature provided an exemption for widows, it intended to benefit females only. In part because women are vastly underrepresented in this Nation's decision-making councils,[20] laws are drafted from a masculine perspective. Ordinarily, absent an express provision to the contrary or something in the subject or context inconsistent with such construction, statutory terms importing the masculine gender apply to females as well.[21] But, with rare exception,[22] words in a statute importing the female gender are subject to

[20] *See Frontiero* v. *Richardson*, 411 U.S. 677, 686 n. 17 (1973).

[21] *Cf.* 1 U.S.C. §1.

[22] *See* P.L. 92-540, 86 Stat. 1092, *amending* 38 U.S.C. §102(b) (wife includes husband, widow includes widower); Fla. Stat. §1.01 (2) ("The masculine includes the feminine and neuter and *vice versa*.") (emphasis added).

grammatical construction—they mean "for women only." Although legislative intent to exclude widowers is thus beyond debate, that intent should supply the starting point, not the terminus, for judicial analysis of the appropriate remedy in this case.

The remedial choice was never addressed by the Florida Supreme Court since it concluded that the "widows only" exemption was constitutional. The trial court, while identifying the constitutional infirmity, failed to perceive the further obligation imposed on a responsible judiciary "to decide whether it more nearly accords with [the legislature's] wishes to eliminate its policy altogether or extend it in order to render what [the legislature] plainly did intend, constitutional." *Welsh* v. *United States*, 398 U.S. 333, 355-56 (1970) (Harlan, J. concurring); *see Skinner* v. *Oklahoma ex rel. Williamson*, 316 U.S. 535, 542-43 (1942). The nature of the necessary inquiry was succinctly described by the Supreme Court of New Jersey:

> . . . The judiciary cannot enlarge the reach of a statute, for this is solely a legislative function. The proposition is obvious enough, and it is equally true that a court may not restrict the scope of a statute. But neither proposition is involved when the question is whether a statute must fall because of a constitutional defect. Rather the question is whether the Legislature would want the statute to survive, and that inquiry cannot turn simply upon whether the statute, if adjusted to the constitutional demand, will cover more or less than its terms purport to cover. Although cases may be found which seem to speak in such mechanical

terms, we think the sounder course is to consider what is involved and to decide from the sense of the situation whether the Legislature would want the statute to succumb. *Schmoll* v. *Creecy*, 54 N.J. 194, 202, 254 A.2d 525, 529-30 (1969).

Similar reasoning is implicitin this Court's judgment in *Frontiero* v. *Richardson, supra*. The *Frontiero* judgment reflects a determination that extension of benefits to spouses of female members of the uniformed services would better serve the legislative purpose than would judicial destruction of the spousal benefit scheme. The same approach, preferring salvage to demoliton, is indicated in diverse decisions of this Court involving state as well as federal laws. *E.g., U.S. Dept. of Agriculture* v. *Moreno*, 41 U.S. L.W. 5105 (U.S. June 25, 1973) (federal food stamps); *Gomez* v. *Perez*, 409 U.S. 535 (1973) (child support under state law); *New Jersey Welfare Rights Organization* v. *Cahill*, 411 U.S. 619 (1973) (state aid to families of working poor); *Richardson* v. *Davis*, 409 U.S. 1069 (1972), *aff'g* 342 F. Supp. 588 (D. Conn. 1972) and *Richardson* v. *Griffin*, 409 U.S. 1069 (1972), *aff'g* 346 F. Supp. 1226 (D. Md. 1972) (social security child benefits); *Weber* v. *Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972) (state workmen's compensation child benefits); *Graham* v. *Richardson*, 403 U.S. 365 (1971) (state public assistance); *Shapiro* v. *Thompson, supra* (state and District of Columbia public assistance); *Levy* v. *Louisiana*, 391 U.S. 68, *rehearing denied*, 393 U.S. 898 (1968) and *Glona* v. *American Guaranty & Liability Ins. Co.*, 391 U.S. 73, *rehearing denied*, 393 U.S. 898 (1968) (state wrongful death recoveries).

The remedial issue was noted and treated explicitly in *Moritz* v. *Commissioner of Internal Revenue, supra,* a decision of particular relevance to the instant case, for it involved a tax benefit available to never married women, but not to never married men. After determining that discriminatory tax treatment could not be justified by generalizations based on sex stereotypes, the Tenth Circuit further declared:

> [Next], we must determine the effect of the invalidity of provisions denying the deduction to men who have never married. Where a court is compelled to hold such a statutory discrimination invalid, it may consider whether to treat the provision containing the discriminatory underinclusion as generally invalid or whether to extend the coverage of the statute. 469 F.2d at 470.

The Tenth Circuit concluded that extension of the coverage of the deduction provision was "logical and proper," and accordingly ruled that "the benefit of the deduction . . . should be extended to [Moritz]."[23] *Accord, Ballard* v. *Laird, supra* (13 year tenure for women in Navy's commissioned service must be extended to men); *cf. In re Estate of Legatos, supra* (property exempt from tax when devised by wife to husband must also be exempt when devised by husband to wife); *Hays* v. *Potlatch Forests, Inc., supra* (consistent with Title VII's employment discrimination prohibition, premium overtime law by its terms applicable to women only must be applied by employer to men as well as women).

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[23] The remedial route in *Moritz* was noted by this Court in *Frontiero* v. *Richardson,* 411 U.S. 677, 691 n. 25 (1973).

Nor is the propriety of extension of benefits a recent judicial discovery. As explained by Mr. Justice Brandeis writing for the Court over four decades ago in *Iowa-Des Moines National Bank* v. *Bennett,* 284 U.S. 239, 247 (1931), the legislature eventually may decide to remove the benefit from all, but in the meantime, the Court may prescribe an extension cure. Similar extensions were authorized in *Yale & Towne Mfg. Co.* v. *Travis,* 262 F. 576 (S.D.N.Y. 1919), *aff'd,* 252 U.S. 60 (1920) (tax exemption granted by statute only to state citizens extended to citizens of other states); *Burrow* v. *Kapfhammer,* 284 Ky. 753, 145 S.W. 2d 1067 (1940), *noted in* 54 Harv. L. Rev. 1078 (1941) (exempt class extended to cure unconstitutional exclusion); *Quong Ham Wah Co.* v. *Industrial Accident Comm'n,* 184 Cal. 26, 192 P. 1021 (1920), *appeal dismissed,* 255 U.S. 445 (1921) (workmen's compensation benefits extended to nonresidents to cure constitutional infirmity).

It should be stressed that invalidation of a statutory benefit is an anomalous response to a plaintiff who seeks extension of the benefit to him. Appellant Kahn, like the complainants in *Frontiero* and *Moritz,* does not subscribe to the mutual suffering theory and has no interest in pursuing a claim to withdraw benefits from others. *Cf. Iowa-Des Moines National Bank* v. *Bennett, supra* at 247 (person subjected to discriminatory taxation cannot be expected to seek payment of increased taxes by others). In this light, the trial court's disposition appears illogical and improper. If that court was unable "to decide from the sense of the situation whether the Legislature would want the [widow's exemption] to succumb," [24] it might at least have adopted an

[24] Some indication of legislative preference is provided by Fla. Stat. §61.08 (1972), requiring alimony and child support to be determined in accordance with a sex-neutral standard. Moreover,

intermediate position, declaring the statute unconstitutional as written, but leaving the choice of cures to the legislature. Precisely this middle ground was adopted in *White* v. *Crook*, 251 F. Supp. 401 (M.D. Ala. 1966), where the three-judge federal district court declared unconstitutional Alabama's exclusion of women from jury service, but deferred further relief to permit the legislature to recast the statute.

Indeed, the course taken by the trial court, *i.e.*, nullification of the widow's exemption, collides head-on with Florida's constitutional and statutory stipulations; the extension remedy sought by Appellant Kahn, on the other hand, is consistent with the dominant purpose expressed in the Florida Constitution and statute.[25] Population statistics alone indicate that the judiciary would disserve legislative intent were it to invalidate the exemption: the Florida population aided by the exemption (widows) is four times larger than the population excluded (widowers).[26] Moreover, most of the widowed men in Florida are over

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the Florida judiciary has clearly indicated that extension is the appropriate remedial route to eliminate legal barriers to equality of the sexes. *Compare Gates* v. *Foley*, 247 So. 2d 40 (Fla. 1971) (extending to wife right to sue for loss of consortium) *with Ellis* v. *Hathaway*, 27 Utah 2d 143, 493 P.2d 985 (1972) (establishing equality between the spouses by forbidding either to sue for loss of consortium).

[25] In *Burrows* v. *Kapfhammer*, 284 Ky. 753, 761-62, 145 S.W.2d 1067, 1072 (1940), the court pointed out that judicial elimination of the statutory exemption there at issue would run directly contrary to "express legislative provision"; extension of the exemption to the excluded class was therefore viewed as the only judicial course consistent with "logic, common sense [and] reason."

[26] In 1970, of males aged 14 years and over, 3.4% were widowers, while 14.0% of the females in the same age group were widows. U.S. Bureau of Census, Census of Population: 1970, Detailed Characteristics, Final Report PC(1)-D11 Florida, October, 1972, at 679-80, noted in Appellees' Motion to Dismiss or Affirm at 4.

65,[27] at or beyond the age when labor force participation terminates with attendant and often drastic reduction in income. Surely the Florida legislature was not so intent on denying the exemption to widowers, a relatively small class of predominantly elderly persons, that it would prefer invalidation of the exemption for the relatively large class of widows to adjustment of the statute to meet the constitutional demand.

CONCLUSION

For the reasons stated above, the decision of the Florida Supreme Court should be reversed, and Florida Statute §196.191(7) should be declared unconstitutional insofar as it differentiates between widowed persons solely on the basis of gender.

On remand, the court below may preserve the express constitutional and statutory stipulations for a widow's exemption by declaring §196.191(7) applicable to all widowed residents.

Respectfully submitted,

RUTH BADER GINSBURG
MELVIN L. WULF
BRENDA FEIGEN FASTEAU
CHRISTINE CASSADAY CURTIS
American Civil Liberties Union Foundation
22 East 40th Street
New York, New York 10016

WILLIAM HOPPE
Second Floor, Concord Building
Miami, Florida 33130

Attorneys for Appellants

[27] Approximately 70% of all widowers and 64% of all widows in Florida are over 65. Bureau of Census, *supra* note 26 at 679.

SUPREME COURT, U. S.

FILED

JAN 18 1974

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-78

MEL KAHN, etc.,

Appellants,

-v.-

ROBERT L. SHEVIN, et al.,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF FOR APPELLEES

ROBERT L. SHEVIN
ATTORNEY GENERAL

SYDNEY H. McKENZIE, III
Assistant Attorney General

The Capitol
Tallahassee, Florida 32304

Attorneys for Appellees
State of Florida

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Argument:

I. The property tax exemption for widows provided by Fla. Stat. §196.191(7) and Art. VII, §3(b), Fla. Const. is based on valid economic considerations and constitutes a reasonable classification determined by actual difference and valid state policy and is properly within the taxing classification power of the state 5

A. Any classification for purposes of taxation is permissible which has a reasonable relation to a legitimate end of governmental action and only if it appears that there is no rational basis for the classification so as to make it patently arbitrary may it be set aside as invidious discrimination in violation of the equal protection clause of the fourteenth amendment .. 5

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C. Even if sex classifications are considered to be inherently suspect, the classification found in Fla. Stat. §196.191(7), is justified when subjected to strict judicial scrutiny, as the state has a compelling interest in protecting widows 22

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U.S. Bureau of the Census, Census of
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U.S. Bureau of the Census, Census of
Population: 1970, GENERAL SOCIAL
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-78

MEL KAHN, etc.,

Appellants,

-v.-

ROBERT L. SHEVIN, et al.,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF
THE STATE OF FLORIDA
[273 So. 2d 72]

BRIEF FOR APPELLEES

REPORT OF OPINIONS BELOW, JURISDICTION, AND STATUTES INVOLVED

Pursuant to Rule 40, Supreme Court Rules, and Paragraph 3 thereof, Appellees adopt Appellant's Report of Opinions Below, Jurisdiction, and Statutes Involved.

QUESTION PRESENTED

WHETHER THE EXEMPTION FROM AD VALOREM TAXATION OF PROPERTY TO THE VALUE OF $500 YEARLY, PROVIDED BY ART. VII, §3(b), FLA. CONST. AND FLA. STAT. §196.191(7) FOR WIDOWS, BUT NOT WIDOWERS, DENIES APPELLANT, A WIDOWER, THE EQUAL PROTECTION OF THE LAWS.

STATEMENT OF THE CASE

The Appellant, a widower, applied to the Dade County Tax Assessor for, and was denied, an exemption from ad valorem taxation for property to the value of $500 under Fla. Stat. §196.191(7), which statute extends such an exemption to persons who are blind, persons who are totally and permanently disabled, and to widows, but not to widowers.

Appellant then filed his complaint for declaratory relief as a class action pursuant to Rule 1.220 Fla.R.C.P., and Fla. Stat. §86.011, alleging denial of his application for exemption under Fla. Stat. §196.191(7) and asserting that as a widower he and others similarly situated were deprived of equal protection and due process of law by the language and application of the statute. The Circuit Court ruled in Appellant's favor and a timely appeal was taken to the Florida Supreme Court which reversed the judgment of the Circuit Court. The Supreme Court held that there was a "fair and substantial relation" between the objective of reducing the factually existent disparity between the economic capabilities of the sexes and the statute affording to women who have lost

a spouse by death a slight economic advantage. (J.S. at A7) Thus, the Florida Supreme Court concluded that Fla. Stat. §196.191(7) is constitutionally valid. (J.S. at A7)

SUMMARY OF ARGUMENT

I.

The granting of a $500 property tax exemption to widows, among others, but not to widowers by Fla. Stat. §196.191(7) and Art. VII, §3(b), Fla. Const. is based on valid social and economic policy determinations and does not deny Appellant the equal protection of the law under the fourteenth amendment.

Although women make up an ever-increasing portion of the work force, they are still far behind in obtaining equality of economic opportunity. The gap between salaries for comparably qualified women and men in like positions is in fact increasing rather than decreasing. Thus, widows, like other women, are not in as favorable a position to support themselves as are other members of society, including widowers, and Florida has taken this into consideration in granting a slight tax advantage to widows.

Such a determination is properly within the broad discretion granted states in allowing tax exemptions, having a fair and substantial relation to the object of the legislation and is in no way palpably arbitrary.

II.

Classifications based on sex are properly found to be valid where they bear a rational relationship to a proper state object, and such classifications are not inconsistent with the equal protection clause of the fourteenth amendment. The attempt by Florida, through a small tax exemption, to reduce the economic disparity between the sexes in the case of widows is a proper use of the state's power to classify, as it is a proper state policy, based upon social as well as economic considerations, to alleviate the hardship to women resulting from the inequality of economic opportunity.

III.

Even should classifications based upon sex be considered to be inherently suspect, the compelling interest of the state in reducing the economic disparity between the sexes, and the resulting encouragement of the elderly to locate in Florida justifies the classification set out in Fla. Stat. §196.191(7) and Art. VII, §3(b), Fla. Const., and is consistent with the equal protection requirements of the fourteenth amendment.

IV.

Should the classifications based on sex be held unconstitutional as violative of the equal protection clause of the fourteenth amendment, this cause should not be remanded to the court below for consideration of whether to judicially expand the definition of widow to include widowers. This issue has already been

fully briefed, argued and considered by the court below. The extension of benefits granted by a provision of the state constitution by judicial redefinition of the term "widow" to include widowers would be improper.

ARGUMENT

I.

THE PROPERTY TAX EXEMPTION FOR WIDOWS PROVIDED BY FLA. STAT. §196.191(7) AND ART. VII, §3(b), FLA. CONST. IS BASED ON VALID ECONOMIC CONSIDERATIONS AND CONSTITUTES A REASONABLE CLASSIFICATION DETERMINED BY ACTUAL DIFFERENCE AND VALID STATE POLICY AND IS PROPERLY WITHIN THE TAXING CLASSIFICATION POWER OF THE STATE.

A. Any classification for purposes of taxation is permissible which has a reasonable relation to a legitimate end of governmental action and only if it appears that there is no rational basis for the classification so as to make it patently arbitrary may it be set aside as invidious discrimination in violation of the equal protection clause of the fourteenth amendment.

It has long been the position of this Court that, in the selection of the subjects of taxation, broad discretion is allowed to

the states.[1] Thus, in Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920), this Court stated that "the latitude of discretion is notably wide in the classification of property for purposes of taxation and the granting of partial or total exemptions upon grounds of policy." And the Court observed in Madden v. Kentucky, 309 U.S. 83, 87-88 (1940):

"The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized. This Court fifty years ago concluded that 'the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation,' and the passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation, even more than in other fields, legislators possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality

[1]Lehnhausen v. Lake Short Auto Parts Co., 410 U.S. 356 (1973); Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522 (1959); Madden v. Kentucky, 309 U.S. 83 (1940); Lawrence v. State Tax Commission of Mississippi, 286 U.S. 276 (1932).

can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it."

So long as the state proceeds on a rational basis having some ground of difference bearing a fair and substantial relation to the object of the legislation, and does not resort to a classification which is palpably arbitrary, the classification has been upheld.[2] "If the selection on classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of equal protection of the law." Brown-Forman Co. v. Kentucky, 217 U.S. 563, 573 (1910). "That a statute may discriminate in favor of a certain class does not render it arbitrary if the discrimination is founded upon a reasonable distinction, or difference in state policy."[3] Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 528 (1959).

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[2]Lindsley v. National Carbonic Gas Co., Inc., 220 U.S. 61 (1910); Louisville Gas & Electric Co. v. Coleman, 277 U.S. 32 (1928); Ohio Oil Co. v. Conway, 281 U.S. 146 (1930).

[3]Citing American Sugar Refining Co. v. Louisiana, 179 U.S. 89 (1900); Stebbins v. Riley, 268 U.S. 137, 142 (1925).

In such a case, the proper test in defining the limits placed by the equal protection clause on state power is whether the classification is "palpably arbitrary" or "invidious." Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973).

The classification in this case effects an exemption from taxation for property owned by widows, blind persons and persons who are totally and permanently disabled, to the value of $500. Such a classification is far from being palpably arbitrary, and in fact rests on a recognition that these groups are likely to face certain economic hardships with which the general population does not have to cope.[4] As to

[4]Appellant cites Moritz v. Commissioner of Internal Revenue, 469 F.2d 466 (10th Cir. 1972), cert. denied 412 U.S. 906 (1973) as support for the proposition that a classification based on sex constitutes invidious discrimination. A careful reading of that opinion, however, indicates that the Court recognized the economic considerations. The Court asserted that "relief" to persons in low income brackets and bearing special burdens of dependence could be achieved. The Court then indicated that "the lack of a basis related to the income of women is illustrated further by the fact that the statute allows the deduction to widowers and divorcees." Thus, that court appeared to indicate that had the statute in question in fact been based upon the inferior income of women, it would have been upheld. 469 F.2d at 470, Footnote 4.

widows, the Supreme Court of Florida reasonably and properly noted that:

"It has been ably pointed out that the object of the legislation here in question is 'to reduce to a limited extent the tax burden on widows who own property to the value of $500 and . . . thereby to "reduce the disparity between the economic . . . capabilities of a man and a woman,". . . ' As recognized in Gruenwald v. Gardner, supra, women workers as a class do not earn as much as men. Certainly this has a 'fair and substantial relation' to the ability of women owners to pay taxes on property of even minimal value.

"We recognize that steps have been and are continuing to be taken toward the elimination of legal barriers to equality of the sexes. Among the significant steps toward this end is the legislative provision for alimony and child support payments by women as well as men. This provision, however, provides a means of taking into consideration the factual economic capability of each woman involved through judicial supervision and control.

"Significantly, the provisions of the statute under review do not provide any means for similar consideration. Therefore, until the steps taken toward legal equality result in equality in fact, a finding of identity between the sexes at this time would rest on fiction and not fact." (J.S. at A6-A7)

Appellant, in arguing that women are not in such an economically inferior position, emphasizes heavily that women have been increasing as a percentage of the work force. (Brief of Appellant, P. 6). He chooses to

ignore the fact that this has not benefited women in regard to earning capacity. In reality, inequality of income is a severe and current problem. Women who work at full-time jobs the year round earn, on the average, only $3 for every $5 earned by men similarly employed.[5] The gap, in fact, was greater in 1970 than it was in 1955. Women's median wage or salary income as a proportion of men's fell from almost 64% in 1955 to 59.4% in 1970.[6]

[5]S.Rep. No. 689, 92d Cong., 2d Sess. 9 (1972).

[6]The U. S. Dept. of Labor, Women's Bureau Fact Sheet on the Earnings Gap, Dec., 1971 (Rev.), contained the following chart:

MEDIAN EARNING OF FULL-TIME YEAR ROUND WORKERS,[a] BY SEX, 1955-70[b]

Year	Median Earnings Women	Men	Women's median earnings as percent of men's
1970	$5,323	$8,966	59.4
1969	4,977	8,227	60.5
1968	4,457	7,664	58.2
1967	4,150	7,182	57.8
1966	3,973	6,848	58.0
1965	3,823	6,375	60.0
1964	3,690	6,195	59.6
1963	3,561	5,978	59.6
1962	3,446	5,794	59.5
1961	3,351	5,644	59.4
1960	3,293	5,417	60.8
1959	3,193	5,208	61.3
1958	3,102	4,927	63.0
1957	3,008	4,713	63.8
1956	2,827	4,466	63.3
1955	2,719	4,252	63.9

a)Worked 35 hours or more a week for 50 to 52 weeks.
b)Data for 1967-70 are not strictly comparable

These same discrepancies in incomes due to sex and the resulting hardship are as equally applicable to Florida as to the nation generally. For example, in Florida in 1969, of all families which had a male head of the household, 9.8% were below the poverty level, while of those which had a female head, 35.8% were below the poverty level.[7] The average income in 1969 for all Florida families was $10,120, while that for Florida families with a female head of household was only $5,718.[8] Florida also has a much higher percentage of widows than widowers. In 1970, of males, age 14 years and over, 3.4% were widowers, while 14.0% of the females in the same age group were widows.[9]

Thus women, although joining the working population in increasing numbers,

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with those for prior years, which are for wage and salary income only and do not include earning of self-employed persons.

[7]U.S. Bureau of the Census, Census of Population: 1970 GENERAL SOCIAL AND ECONOMIC CHARACTERISTICS, Final Report PC(1)-C11 Florida, April 1972, at 203.

[8]Id. at 233.

[9]U.S. Bureau of the Census, Census of Population: 1970 DETAILED CHARACTERISTICS, Final Report PC(1)-D11 Florida, October 1972, at 679-80.

are nevertheless subject to a clear economic disadvantage in the area of comparability of incomes. On this basis, it can hardly be said that there was no rational basis on which the citizens of the State of Florida could have determined the subject classification nor, therefore, could it be said that the classification is patently arbitrary.

B. Distinctions based on sex may properly be found to exist, and the proper test of the validity of such distinctions should be whether the classification bears a rational relationship to a state object that is sought to be advanced in a manner which is consistent with the equal protection clause of the fourteenth amendment.

The Court has long held that the equal protection clause of the fourteenth amendment does not require identity of treatment for all citizens, or preclude a state, by legislation, from making classifications and creating differences in the rights of different groups.[8] It is only when the discriminating treatment and varying standards, as created by the legislative classifications, are

[8]Brown-Forman Co. v. Kentucky, 217 U.S. 563, 573 (1910); State Board of Tax Commissioners v. Jackson, 283 U.S. 527, 533 (1931); American Sugar Refining Co. v. Louisiana, 179 U.S. 89 (1900). See Williams v. McNair, 316 F.Supp. 134, 136 (D.S.C. 1970) aff'd without opinion 401 U.S. 951 (1971).

arbitrary and wanting in any rational justification that they offend the equal protection clause.[11] Specifically, a legislative classification based on sex has often been held to be constitutionally permissible.[12]

In Reed v. Reed, 404 U.S. 71 (1971), the Court struck down a sex-based classification in an Idaho statute. The language of the Court was substantially in accordance with prior cases however:

"In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. Barbier v. Connolly, 113 U.S. 27 (1885); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911); Railway Express Agency v. New York, 336 U.S. 106 (1949); McDonald v. Board of Election Commissioners,

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[11] Bell's Gap R.Co. v. Pennsylvania, 134 U.S. 232, 237 (1890); Magoun v. Illinois Trust & Savings Bank, 170 U.S. 283, 293 (1898); Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 527 (1959).

[12] See West Coast Hotel Co. v. Parrish, 300 U.S. 379, 394-395 (1937); Radice v. New York, 264 U.S. 292, 296-298 (1924); Goesaert v. Cleary, 335 U.S. 464 (1948); Hoyt v. Florida, 368 U.S. 57 (1961); Williams v. McNair, 316 F.Supp. 134 (D.S.C. 1970), aff'd without opinion 401 U.S. 951 (1971); Forbush v. Wallace, 341 F.Supp. 217 (M.D.Ala. 1971), aff'd without opinion 405 U.S. 970 (1972).

394 U.S. 802 (1969). The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' Royster Guano Co. v. Virginia, 253 U.S. 412 (1920). The question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the operation of §§15-312 and 15-314.

* * * * *

". . . To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex.

". . . By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause. Royster Guano Co. v. Virginia, supra." 404 U.S. at 75-77. (emphasis supplied)

Thus, while striking down a classification established merely for the administrative convenience of eliminating hearings, the Court reaffirmed that, even where sex is the basis of classification, a classification which is reasonable, and not arbitrary, and which rests upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced are treated alike, does not violate the equal protection clause of the fourteenth amendment. In setting out this test, the Court cited only Royster Guano Co. v. Virginia, 253 U.S. 412 (1920), in support of its determination. The test of equal protection as stated in Royster Guano Co. v. Virginia was that:

"It is unnecessary to say that the 'equal protection of the laws' required by the 14th Amendment does not prevent the states from resorting to classification for the purposes of legislation. Numerous and familiar decisions of the court establish that they have a wide range of discretion in that regard. But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. The latitude of discretion is notably wide in the classification of property for purposes of taxation and the granting of partial or total exemptions upon grounds of policy . . . . Nevertheless, a discriminatory tax law cannot be sustained against the complaint of a party aggrieved if the classification appears to be altogether illusory." 253 U.S. at 415.

It does not appear, therefore, that Reed v. Reed, supra, determined that the state had the same burden, where sex is the basis of a classification, as it would have where certain classifications such as race,[13] nationality[14] and alienage[15] were challenged. Those cases subject the classification to the "most rigid scrutiny," Korematsu v. United States, 323 U.S. 214, 216 (1944), and the showing of a "compelling state interest." Shapiro v. Thompson, 394 U.S. 618 (1969).

Further indication that the test for sex-based distinctions remained as it had historically been treated exists. Four months after the Reed decision, this Court affirmed without opinion[16] the holding of a three judge District Court in Forbush v. Wallace, 341 F.Supp. 217 (M.D.Ala. 1971). In that case, the District Court upheld both the requirement that a wife upon marriage take her husband's surname and the requirement that she use that name in order to obtain a driver's license. The District Court reasoned that:

"This judicial pronouncement, as with any state statute or regulation, must have a

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[13]Bolling v. Sharpe, 347 U.S. 497 (1954); McLaughlin v. Florida, 379 U.S. 184 (1964); Loving v. Virginia, 388 U.S. 1 (1967).

[14]Hirabayashi v. United States, 320 U.S. 81 (1943); Korematsu v. United States, 323 U.S. 214 (1944); Oyama v. California, 332 U.S. 633 (1948).

[15]Graham v. Richardson, 403 U.S. 365 (1971).

[16]405 U.S. 970, aff'g 341 F.Supp. 217 (M.D.Ala. 1971).

rational basis. It is well settled that 'the Equal Protection Clause does not make every difference in the application of laws to different groups a violation of our constitution.' Williams v. Rhodes, 1968, 393 U.S. 23, 30. Thus, as a general rule, a law is not violative of the Fourteenth Amendment, despite the existence of discrimination in the technical or broad sense, where the law at issue maintains some rational connection with a legitimate state interest. E.g., McDonald v. Board of Election Commissioners, 1969, 394 U.S. 802, 808-09; Kotch v. Board of River Port Pilots Commissioners, 1947, 330 U.S. 552. Furthermore, when a court is presented with a challenge to a seemingly valid state law on equal protection grounds, it must sustain that law if it can discern any rational basis. E.g., Dandridge v. Williams, 1970, 397 U.S. 471; Metropolitan Casualty Insurance Co. v. Brownell Industries, 1935, 294 U.S. 580; Borden's Farm Products Co. v. Baldwin, 1934, 293 U.S. 194." 341 F. Supp. at 222.

In Frontiero v. Richardson, 411 U.S. 677 (1973), the Court once again examined the question of the degree of justification necessary for classification based on sex. While four members of the Court indicated a willingness to extend the "inherently suspect" test to sex classifications, the

majority of the Court refused to do so.[17] Mr. Justice Powell, joined by the Chief Justice and Mr. Justice Blackmun stated:

"I agree that the challenged statutes constitute an unconstitutional discrimination against service women in violation of the Due Process Clause of the Fifth Amendment, but I cannot join the opinion of Mr. Justice Brennan, which would hold that all classifications based upon sex, 'like classifications based upon race, alienage, and national origin,' are 'inherently suspect and must therefore be subjected to close judicial scrutiny.' Supra at 682. It is unnecessary for the Court in this case to characterize sex as a suspect classification, with all of the far-reaching implications of such a holding. Reed v. Reed, 404 U.S. 71 (1971), which abundantly supports our decision today, did not add sex to the narrowly limited group of classifications which are inherently suspect. In my view, we can and should decide this case on the authority of Reed and reserve for the future any expansion of its rationale." 411 U.S. at 691-92.

This reasoning is sound and is a recognition that distinctions based on sex may be

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[17]Mr. Justice Stewart, in concurring with the result, limited his finding to a determination that the statutes involved worked an "invidious" discrimination. Mr. Justice Rehnquist dissented on the grounds stated by the District Court. Mr. Justice Powell, joined by the Chief Justice and Mr. Justice Blackmun, concurred, but for the reasons set out in the text, infra.

rational and beneficial to both sexes. Such is the case before us. Women are in an inferior economic position as previously noted, which does not appear to be correcting itself in spite of the legislative efforts which have been made. In fact, as previously noted, the situation has become even more aggravated over the years. To try to limit the extent of this burden is a proper policy determination of the state and the statutory exemption constitutes a rational means for doing so. As noted by the Second Circuit Court of Appeals in Gruenwald v. Gardner, 390 F.2d 591 (2d Cir. 1968), where the court held that a statute granting women more favorable treatment than men in computing social security benefits does not violate the Civil Rights Act:

"The appellant concedes that women, as a class, earn less than men, that their economic opportunities in higher age groups are less, and that higher benefits will operate as an inducement for their earlier retirement, but disputes 'the unequal treatment of two individuals solely because of sex' and argues that a 'classification must rest upon a difference which is real * * *.' . . .

"There is here a reasonable relationship between the objective sought by the classification, which is to reduce the disparity between the economic and physical capabilities of a man and a woman--and the means used to achieve that objective in affording to women more favorable benefit computations. There is, moreover, nothing arbitrary or unreasonable about the application of the principle underlying the statutory differences in the computations for men and women. Notwithstanding the favorable treatment granted

to women in computing their benefits, the average monthly payments to men retiring at age 62 still exceeds those awarded women retiring at that age. Social Security Bulletin, Annual Statistical Supplement 1965, U. S. Dept. of Health, Educa. and Welfare, at 47, 56, 64, 69. Social Security Bulletin, Annual Statistical Supplement 1963, supra at 47." 390 F.2d at 592.

A recent decision by a three judge District Court in New Jersey in Wiesenfeld v. Secretary of Health, Education, and Welfare, 42 L.W. 2326 (1973), concurred in this analysis of Reed and Frontiero. In reviewing a section of the social security act providing widows, but not widowers, with survivors' benefits while caring for children entitled to insurance benefits, the Court stated:

". . . The Supreme Court has declined to add sex to the list of inherently suspect classifications. Frontiero v. Richardson, 411 U.S. 677, 41 L.W. 4609 (1973); Reed v. Reed, 404 U.S. 71, 40 L.W. 4013 (1971). . . .

* * * * *

"In Reed and Frontiero we do not discern a 'general shift' of standards nor the establishment of a 'new intermediate' equal protection test, and we reject those cases which adopt such standards. We do, however, perceive an expression of deep concern by the Supreme Court to analyze statutory classifications based upon sex in more pragmatic terms of this everyday modern world rather than in the stereotyped generalizations of the Victorian age. . . . " 42 L.W. at 2326-27.

The District Court then reviewed the matter first under the "traditional" test and determined that it satisfied that standard:

". . . [W]e must first proceed to an analysis of whether Section 402(g) is rationally related to some valid public purpose.

"When this standard is applied to Section 402(g), we find that this measure is a rational attempt by Congress to protect women and families who have lost the male head of the household. This choice by Congress is not arbitrary because it is very evident that women have been and continue to be unable to earn income equal to that of men even though Congress has clearly indicated that job discrimination on the basis of sex shall be unlawful." 42 L.W. at 2327.[18]

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[18]While that court then applied the "close judicial scrutiny" test, and found the provision to violate that test, it did so only after determining that the legislation, in fact, discriminates against some of those it intends to protect:

". . . [E]ven though Congress may have intended that this section rectify the effects of past and present discrimination against women, it operates to 'heap on' additional economic disadvantages to women wage earners such as [the deceased wife]. During her employment as a teacher, maximum social security payments were deducted from her salary. Yet, upon her tragic death, her surviving spouse and child receive less

Clearly the granting to widows, as an economically disadvantaged group, a small exemption from ad valorem property taxation does bear a rational relationship to the goal of reducing the existent economic gap and is valid under the fourteenth amendment. To determine otherwise would be to ignore the realities of economic hardship faced by widows in our society.

C. Even if sex classifications are considered to be inherently suspect, the classification found in Fla. Stat. §196.191(7), is justified when subjected to strict judicial scrutiny, as the state has a compelling interest in

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social security benefits than those of a male teacher who earned the same salary and made the same social security payments.

"While affirmative legislative or executive action may satisfy a compelling governmental interest to undo the past discrimination against such suspect groups as racial minorities, such action cannot meet the higher equal protection standard if it discriminates against some of the group which it is designed to protect. Because Section 402(g) discriminates against women * * * who have successfully gained employment as well as against men and children who have lost their wives and mothers, we find this section violates the Fifth Amendment."42 L.W. at 2327.

Such is not the situation in the case at hand. The statute is intended to benefit widows, who, as a group, are subject to economic disadvantages, but none of whom, unlike the Wiesenfeld situation, are potentially discriminated against by the legislation.

protecting widows.

In Frontiero v. Richardson, supra, 411 U.S. at 689, it is indicated by four members of the Court that classifications based upon sex, like classifications based on race, alienage, and national origin, are inherently suspect and should therefore be subjected to close judicial scrutiny. This was the first indication by any members of the Court that such scrutiny should be given to this area. While this approach, we submit, does not recognize the realities of the differences between men and women which justify classifications where they are rational, nevertheless, should the Court determine to apply the stricter test, the State of Florida does in fact have a compelling interest which is being furthered.

Unlike the situation in Frontiero, the purpose of the provision in Florida's Constitution and statutes is not merely "administrative efficiency" and is not subject to the conclusion of the Court in that case that:

". . . by according differential treatment to male and female members of the uniformed services for the sole purpose of achieving administrative convenience, the challenged statutes violate the Due Process Clause of the Fifth Amendment insofar as they require a female member to prove the dependency of her husband." (emphasis supplied) 411 U.S. at 690-91.

It is to be noted that, while the Court refused to recognize sex differentiation for the sole purpose of achieving administrative convenience as a compelling state interest, the Court did indicate that if the Government could

affirmatively show that money was saved it would suffice:

"The Government offers no concrete evidence however, tending to support its views that such differential treatment in fact saves the Government any money. In order to satisfy the demands of strict judicial scrutiny, the Government must demonstrate, for example, that it is actually cheaper to grant increased benefits with respect to all male members, than it is to determine which male members are in fact entitled to such benefits and to grant increased benefits only to those members whose wives actually meet the dependence requirement. Here, however, there is substantial evidence that, if put to the test, many of the wives of male members would fail to qualify for benefits. And in light of the fact that the dependency determination with respect to the husbands of female members if presently made solely on the basis of affidavits, rather than through the more costly hearing process, the Government's explanation of the statutory scheme is, to say the least, questionable." 411 U.S. at 689-90.

Florida is not solely concerned with saving money or administrative convenience. To grant an exemption to widows in fact is a considerable expense to the state in lost revenues. Nevertheless, the state recognizes the plight of women in the economic area and the decreased ability, through no fault of their own, to sustain themselves in today's

job market.[19] Florida, with its large elderly population, has a special concern for widows who may be faced with this problem and has a compelling interest in giving them special tax consideration. This fact is bolstered by the anticipation that such action will encourage this group to continue to seek retirement homes in Florida. Such economic and social considerations are certainly not in a class with mere administrative convenience, nor even with the money-saving basis which the Court indicated in Frontiero could satisfy their strict judicial scrutiny. Considering these compelling interests of the citizens of Florida, it should be determined that sufficient reason exists to uphold the statute even under such strict scrutiny.

II.

SHOULD THE AD VALOREM TAX EXEMPTION GRANTED TO WIDOWS BY ART. VII, §3(b), FLA. CONST., AND FLA. STAT. §196.191(7) BE HELD TO BE UNCONSTITUTIONAL, THIS CAUSE SHOULD NOT BE REMANDED TO THE COURT BELOW FOR CONSIDERATION OF JUDICIALLY EXPANDING THE WORD "WIDOW" TO INCLUDE WIDOWERS.

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[19] This is akin to the situation suggested in Wiesenfeld v. Secretary of Health, Education, and Welfare, 42 L.W. 2326 (1973), where the New Jersey District Court suggested that "affirmative legislative or executive action may satisfy a compelling governmental interest to undo the past discrimination against such suspect groups as racial minorities, ..." 42 L.W. at 2327

Appellant urges that should this Court determine that the gender-based classifications in §196.191(7), Fla. Stat. and Art. VII, §3(b), Fla. Const., violate the fourteenth amendment to the United States Constitution, this cause should be remanded to the Florida Supreme Court for consideration of whether the constitutional infirmity could be remedied by holding the exemption available to all persons, otherwise qualified, who have lost a spouse by death. Appellant has asserted that "[t]he remedial choice was never addressed by the Florida Supreme Court since it concluded that the 'widows only' exemption was constitutional." Appellants' Brief at 26. Contrary to this assertion, both the trial court, in holding the statute to be unconstitutional, and the Florida Supreme Court, in reversing that holding, did consider the propriety of "expanding" the definition of "widow" to include males as well as females and held that they were unable to do so.[20]

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[20]The Trial Judge held "this Court is powerless to expand the meaning of 'widow' to include both women and men . . . . " (J.S. at A3) The Florida Supreme Court was in accord:

"We agree that the term 'widow' may not be judicially redefined to include a man who has lost his wife since the legislative intent obviously limits the application of the term only to a woman who has lost her husband by death. This definition is in conformance with the unvarying legislative and judicial use of the term in other areas. [Citing City of Jacksonville Beach v. State,

This point was fully briefed and argued before the Florida Supreme Court by both Appellant and Appellees.

It should also be pointed out that the gender-based classification under consideration here is not simply one instituted by the legislature, but is an expression of the will of the people of Florida who ratified the provisions of Art. VII, §3(b), Fla. Const., in November of 1968. Thus, if this cause were to be remanded, the Florida Supreme Court would have to consider not what the legislature intended by enacting

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151 So.2d 430 (Fla. 1963); Wilson v. Fridenburg, 19 Fla. 461 (1882); In re Estate of Yohn, 229 So.2d 612 (Fla. App. 1st, 1969), In re Beacher's Estate, 177 So.2d 838 (Fla. App. 3rd, 1965).] (J.S. at A5-A6)

In Brinson v. State, Case No. 43932 (Fla.Sup.Ct., filed Jan. 9, 1974), rev'g 278 So.2d 317 (1 D.C.A. Fla. 1973), the Florida Supreme Court held that Florida's rape statute, Fla. Stat. §794.01, could not be judicially construed to apply to a defendant accused of forcible carnal knowledge of a male:

"It is not the province of the judiciary to legislate; therefore, for the Court to change the definition of 'female' found in Florida Statutes, §794.01, to be the same as the more inclusive word 'person' is to invade the province of the Legislature." Slip Opinion at 3.

Fla. Stat. §196.191(7), but what the people of Florida intended when they ratified the mandatory, self-executing exemption provision of Art. VII, §3(b), of the 1968 Florida Constitution. The universally accepted definition of the word "widow" to refer only to females was undoubtedly in the minds of the people when they ratified this provision of our constitution, and there can be little question but that their understanding of the provision and their intention in ratifying it was to grant the exemption only to a woman who has lost her spouse by death.

Appellant has cited numerous cases in support of his proposition that a judicial extension of benefits under an otherwise unconstitutional statute is proper.[21] In those cases the courts have generally looked to the overall legislative purpose of the statutes involved in order "to decide whether it more nearly accords with [the legislature's] wishes to eliminate its policy altogether or extend it in order to render what [the legislature] plainly did intend, constitutional." Welsh v. United States, 398 U.S. 333, 355-56 (1970) (Harlan, J., Concurring). Appellant has cited no case in which the courts have extended the benefits provided by a provision of a state constitution. The reason for such judicial restraint is sound. When a court extends the benefits

[21] See Appellant's Brief at P. 26-30.

of a legislative enactment, it does so because it feels that is what the legislature itself would do in the face of having the provision otherwise fall for some constitutional infirmity. However, should the court misread the will of the legislature, it is usually a relatively simply matter for the legislature to repeal the provision altogether. The situation is entirely different when the benefits sought to be extended are provided not by statute, but by an expression of the will of the people in a state constitution. Should the court misread the will of the people in this situation, it can be rectified only by a constitutional amendment. The process of amending Florida's Constitution is far more costly and lengthy than the legislature's enacting a statute,[22] and until it is amended,

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[22]The procedure for amending Florida's Constitution is provided in Article XI, Fla. Const. (1968). The proposed amendment may originate either by joint resolution agreed to by three-fifths of the membership of each of the two houses of Florida's Legislature (Art. XI, §1), or by an initiative petition "signed by a number of electors in each of one half of the congressional districts of the state, and of the state as a whole, equal to eight percent of the votes cast in each of such districts respectively and in the state as a whole in the last preceeding election in which presidential electors were chosen. (Art. XI, §3) In either case, the proposed amendment must be approved by a vote of the electors before it may become effective. (Art. XI, §5)

public funds will be lost by virtue of extending a tax exemption to a class of persons which the people have not expressly provided for. On the other hand, should the Court hold the widow's exemption provision of Florida's Constitution to be invalid, then the people of Florida would have the opportunity to affirmatively express their will and desire to extend an exemption to both widows and widowers.

CONCLUSION

For the reasons stated above, the decision of the Florida Supreme Court should be affirmed and Art. VII, §3(b), Fla. Const., and Fla. Stat. §196.191(7) should be declared to provide a proper classification within the taxing power of the State of Florida, not in violation of the equal protection clause of the fourteenth amendment.

However, should the Court hold the gender-based classification to be unconstitutional, this cause should not be remanded for consideration of whether to judicially redefine the term "widow" to include widowers.

Respectfully submitted,

ROBERT L. SHEVIN
ATTORNEY GENERAL

SYDNEY H. McKENZIE, III
Assistant Attorney General

The Capitol
Tallahassee, Florida 32304

Attorneys for Appellees
State of Florida

CERTIFICATE OF SERVICE

I, SYDNEY H. McKENZIE, III, a member of the Bar of the Supreme Court of the United States, and of counsel for Appellees herein, hereby certify that I have this day served three (3) printed copies of the foregoing BRIEF FOR APPELLEES on the Appellant herein, by depositing same in a United States Post Office with first class postage prepaid addressed to counsel of record for the Appellant as follows:

RUTH BADER GINSBURG
American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016

DONE this 18th day of January, 1974.

ROBERT L. SHEVIN
ATTORNEY GENERAL

Sydney H. McKenzie, III

SYDNEY H. McKENZIE, III
Assistant Attorney General

The Capitol
Tallahassee, Florida 32304

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-78

MEL KAHN, etc.,

Appellants,

—v.—

ROBERT L. SHEVIN, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

REPLY BRIEF FOR APPELLANTS

RUTH BADER GINSBURG
MELVIN L. WULF
BRENDA FEIGEN FASTEAU
CHRISTINE CASSADAY CURTIS
American Civil Liberties Union Foundation
22 East 40th Street
New York, New York 10016

WILLIAM HOPPE
Second Floor, Concord Building
Miami, Florida 33130

Attorneys for Appellants

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MEL KAHN, etc.,

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ROBERT L. SHEVIN, *et al.*,

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

REPLY BRIEF FOR APPELLANTS

I.

A dispensation setting women apart from similarly situated men does not assist in undoing inequalities in economic opportunity women encounter.

Appellees justify the gender line set by the widows tax exemption (Fla. Stat. §196.191(7)) as a reasonable means of serving state policy "to alleviate the hardship to women resulting from the inequality in economic opportunity."[1] The theme is familiar. Last term, this Court was asked to approve the gender differential challenged in *Frontiero* v. *Richardson,* 411 U.S. 677 (1973), because the statute dealt with "economic benefits" and reflected "the realities of

[1] Brief for Appellees at 4.

American life"—women's dependence on men.[2] Similarly, in *Moritz* v. *Commissioner of Internal Revenue*, 469 F.2d 466 (10th Cir. 1972), *cert. denied*, 412 U.S. 906 (1973), the Court of Appeals was asked to approve exclusion of never married men from a tax benefit granted never married women because "employment opportunities and pay scales for women remain more restricted than for men."[3] The justification should fare no better here than it did in *Frontiero* and *Moritz*, for "benign dispensations" that set females apart from similarly situated males shore up the very attitudes and traditions that have so long served to keep women "in their place."[4]

It should be stressed that wide latitude of discretion in classifying *property* for tax purposes is not at issue in this case. What is in controversy is the breadth of discretion to classify *persons* solely on the basis of an immutable birth trait that bears no necessary relationship to need or abil-

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[2] Brief for Appellees, *Frontiero* v. *Richardson*, No. 71-1694, at 7, 10, 11-12.

[3] Brief for Appellee, 10th Cir. No. 71-1127, at 14; see also (Solicitor General's) Petition for a Writ of Certiorari, No. 72-1298, at 8-11.

Appellees' reading of the *Moritz* opinion (Brief for Appellees at 8 n. 4) is selective rather than "careful." Use of a gender classification in lieu of an income classification was the invidious means upon which the opinion focused. The further point made by the *Moritz* court concerning allowance of the deduction to widowers and divorcés but not to never married men, responded to a wholly distinct argument made by Moritz, i.e., that the statute differentiated irrationally between members of the same sex: "It merits emphasis that, in addition to its wholly irrational distinction between single sons and daughters, the statute capriciously prefers sons who are widowed or divorced to sons who are lifelong bachelors." Brief for Appellant, *Moritz* v. *Commissioner of Internal Revenue*, 10th Cir. No. 71-1127, at 24-25. Cf. text at notes 8-10 *infra*.

[4] See generally K. M. Davidson, R. B. Ginsburg & H. H. Kay, Text, Cases and Materials on Sex-Based Discrimination, Ch. 1 (Constitutional Aspects), especially at 8-10, and 53-57 (1974).

ity. Cf. *In re Estate of Legatos*, 1 Cal. App. 3d 657, 662, 81 Cal. Rptr. 910, 913 (1969) ("Both in their incidence and innate characteristics tax moneys are sexless and soulless.") If appellees' rationale is accepted, then Florida could, with at least equally "compelling" justification, dispense tax exemption solely on the basis of race or national origin.

Overlooked or misapprehended in appellees' presentation is the critical distinction between lump treatment of women as the inferior and therefore needier sex, and measures designed to undo the inequalities in economic opportunity women encounter. Continued exclusion of widowers from a tax exemption initiated in 1885 simply perpetuates the policy of a society in which women were separate and unequal.[5] The exemption surely does not address "the plight of women in the economic area" through means calculated to aid them "to sustain themselves in today's job market."[6] For such means address the problem at its source; principal examples are laws prohibiting gender discrimination in education, employment, financing, housing, and public accom-

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[5] "So great a favourite [was] the female sex of the laws of [Florida]" that women were accorded a widows exemption long before they achieved the franchise. Cf. I Blackstone, Commentaries 442-45 (1765). Similar solicitude was exhibited by this Court in *Quong Wing* v. *Kirkendall*, 223 U.S. 59 (1912) (upholding license fee exemption for women operators of hand laundries where no men were employed), and *Breedlove* v. *Suttles*, 302 U.S. 277 (1937) (upholding poll tax legislation more onerous for men than for women—women not required to pay for years in which they did not vote).

[6] Brief for Appellees at 24-25 (text at note 19). In this respect, Florida's exemption resembles the "favor" supplied by the differential in *Gruenwald* v. *Gardner*, 390 F.2d 591 (2d Cir.), *cert. denied*, 393 U.S. 982 (1968), discussed in Brief for Appellants at 23-24. More recently, legislatures and courts have become increasingly skeptical of such "favors." See, e.g., *Chastang* v. *Flynn and Emrich Co.*, 365 F.Supp. 957, 965-67 (D. Md. 1973).

modations.[7] Significantly, Florida's utilization of this means to undo inequalities has been minimal.[8]

Moreover, appellees' heartwarming statement of Florida's policy "to alleviate hardship to women" who must cope with the world without a male partner, and appellees' statistical references,[9] highlight a further irrationality in the statutory scheme. No gender-based exemption is accorded the female head of household who never married, or whose marriage was terminated by divorce. The unmarried or divorced woman has no greater economic opportunities than her widowed sister, indeed she may encounter sharper prejudice in the job market.[10] Further, she receives no statutory share in a man's estate, as does the widow,[11] to ease her plight.

Decades ago Burnita Shelton Matthews[12] commented: "It is of course disappointing to women that men of the legal

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[7] See, e.g., Griffiths, The Law Must Reflect the New Image of Women, 23 Hastings L.J. 1 (1971).

[8] While Florida prohibits sex discrimination in government employment, Fla. Stat. §§112.041, 112.042 (1967), 110.092 (1969), most of its anti-discrimination laws omit gender from the catalogue. See Fla. Stat. §§409.026 (1970) (prohibiting discrimination on the basis of race, color, or religion, but not sex, in the administration of social services), 509.092, 509.141 (1970) (discrimination in certain places of public accommodation—covers race, religion and national origin, but not sex).

[9] Brief for Appellees at 11.

[10] See, e.g., *Doe* v. *Osteopathic Hospital*, 333 F.Supp. 1357 (D. Kan. 1971) (termination of employment of unwed expectant mother); *Cirino* v. *Walsh*, 66 Misc. 2d 450, 321 N.Y.S. 2d 493 (Sup. Ct. 1971) (unwed mother who met all objective criteria for school crossing guard position found "not qualified" by police department because birth status of her children showed she lacked "good character").

[11] See *Simons* v. *Miami Beach First National Bank*, 381 U.S. 81 (1965).

[12] Then counsel to the National Women's Party, later United States District Judge for the District of Columbia.

profession are unable to see equality as equity when applied as between men and women." Women Should Have Equal Rights With Men, A Reply, 12 A.B.A.J. 117, 120 (1926). While benefits for widows, but not for widowers, originated in all-male chambers, the direction taken by women allowed to speak for themselves is clear: groups and legislators dedicated to the elimination of discrimination against women have emerged as principal proponents of protection on an equal basis to both men and women.[13]

Finally, appellees' analysis[14] of *Wiesenfeld* v. *Secretary of Health, Education and Welfare*, Civil Action No. 268-73, D.N.J. December 11, 1973, 42 U.S. Law Week 2326, misses the essential point. Indeed, the claims of Stephen Wiesenfeld and Mel Kahn are barely distinguishable. In *Wiesenfeld*, 42 U.S.C. §402(g) was declared unconstitutional "insofar as it discriminates against widowers on the basis of their sex"; defendant was enjoined "from denying benefits . . . to widowers solely on the basis of sex." Had Paula Wiesenfeld died in Florida, no "benign dispensation" would have been accorded her surviving spouse under Fla. Stat. §196.191(7), despite the tragic impact of her death upon her family. Whether the female partner contributes to the economic welfare of her family through gainful employment

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[13] E.g., Griffiths, *supra* note 7, at 8-9. Prime sponsors of full extension of widows benefits to widowers under Social Security are Representatives Martha Griffiths and Bella Abzug. See, e.g., H.R. 9,715, 90th Cong., May 8, 1967; H.R. 841, 91st Cong., January 3, 1969; H.R. 3,289, 92d Cong., 1st Sess., February 2, 1971 (all introduced by Representative Griffiths); H.R. 15,528, 16,036, 16,101, 92d Cong., 2d Sess., June 15, 1972, July 26, 1972, and July 31, 1972 (introduced by Representative Abzug); H.R. 1570, 93d Cong., 1st Sess., January 9, 1973 (introduced by Representative Griffiths). The fact that the commission that wrote the 1968 Florida Constitution included only one woman among thirty-six members may well explain why the 1885 widows exemption emerged unchanged and was not converted to a widowed persons exemption. See 25A Fla. Stat. Ann. at ix.

[14] Brief for Appellees at 20-23, 25 and nn. 18, 19.

or homemaking services[15] or, as is increasingly the reality, through productive effort both on the job and at home, surely recognition of her worth would be enhanced by declaring Fla. Stat. §196.191(7) equally applicable to widows and widowers.

II.

The remedial choice on remand.

Based upon Alice-in-Wonderland reasoning, appellees would foreclose consideration of any remedial route other than elimination of the widows exemption.[16] Demolition of the exemption policy, "relief" surely not sought by appellant, is urged by appellees because: (1) the people of Florida ratified a revised Constitution in 1968; (2) that Constitution, among its many provisions, carried forward from the 1885 Constitution provision for a widows tax exemption; (3) curing the underinclusive classification by extending the exemption to widowers risks misreading the will of the people. Left out of this assessment is the larger risk of misreading that a demolition course entails. The exemption is currently available to approximately three-quarters of the widowed population.[17] Inclusion of the re-

[15] See Walker & Gauger, The Dollar Value of Household Work (College of Human Ecology, Cornell Univ. 1973).

[16] The Florida Supreme Court considered only the threshold question, whether the word "widow" could be defined to mean "widowed person." It ruled against such expansive definition. That court's further ruling that the gender line was constitutional left it without occasion to consider the remedial choice posed by an underinclusive classification. Nor is *Brinson* v. *State* (Fla. Sup. Ct., January 9, 1974, cited in Brief for Appellees at 27) relevant to a tax exemption constitutionally infirm for underinclusion. *Brinson* involved a criminal charge; judicial extension of a criminal statute, the Florida Supreme Court pointed out, is barred by the due process clause. No such impediment exists when the issue is extension of a benefit.

[17] See Brief for Appellant at 30 n. 26.

maining quarter is a small adjustment in comparison to the radical change effected by elimination of the exemption.

Moreover, the 1968 Constitution, including the widows tax exemption authorization, was presented to the people on a take-it-or-leave-it basis. The voters' acceptance of a three-quarter loaf, all that was offered them, surely does not indicate that they would have refused the whole, much less that they would have preferred abstinence to a full portion. On the contrary, the voters' approval of two new constitutional provisions suggests precisely the opposite. The 1968 Constitution substitutes for the former provision that "all men are equal before the law," the guarantee that "all natural persons are equal before the law," [18] and further stipulates that "there shall be no distinction between men and women in the holding, control, disposition, or encumbering of their property." [19] In short, a declared purpose of the exemption, to encourage the elderly "to continue to seek retirement homes in Florida," [20] signals the direction for a judiciary concerned with preservation rather than destruction of legislative policy and the will of the people.[21]

In any event, since widows were accorded the exemption during the period herein question, the denial of equal protection to appellants can be repaired only by according exemption to them for that period.

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[18] Art. 1, §2.

[19] Art. 10, §5.

[20] Brief for Appellees at 25.

[21] Cf. *Guinn* v. *United States*, 238 U.S. 347, 366-67 (1925); Note, 55 Harv. L. Rev. 1030, 1034-36 (1942). On remand, at the very least, the Florida Supreme Court should have the opportunity to consider whether it wishes to adopt a remedial approach in harmony with this Court's precedent. See, e.g., *Frontiero* v. *Richardson*, 411 U.S. 677, 691 n. 25 (1973), where the annual cost factor

CONCLUSION

For the reasons presented by appellants, the decision of the Florida Supreme Court should be reversed, and Fla. Stat. §196.191(7) should be declared unconstitutional insofar as it differentiates between widowed persons solely on the basis of gender.

Respectfully submitted,

RUTH BADER GINSBURG
MELVIN L. WULF
BRENDA FEIGEN FASTEAU
CHRISTINE CASSADAY CURTIS
American Civil Liberties Union Foundation
22 East 40th Street
New York, New York 10016

WILLIAM HOPPE
Second Floor, Concord Building
Miami, Florida 33130

Attorneys for Appellants

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for the benefit extended was an estimated $3.5 million in the Air Force and $1 million in the Navy. See Hearings Before the Special Subcomm. on the Utilization of Manpower in the Military of the House Comm. on Armed Services, 92d Cong., 1st & 2d Sess. 12502-12503 (1972) (estimates for the other armed services not reported). Considerably higher costs were entailed in, e.g., *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *Graham* v. *Richardson*, 403 U.S. 365 (1971); and *New Jersey Welfare Rights Organization* v. *Cahill*, 411 U.S. 619 (1973). See also *In re Estate of Legatos*, 1 Cal. App. 3d 657, 81 Cal. Rptr. 910 (1969) (gender-based tax exemption judicially extended to cure underinclusion).

Attorneys for appellant gratefully acknowledge the assistance provided in the preparation of this brief by Mary R. Hardin, third year student, Columbia Law School.

KAHN v. SHEVIN, ATTORNEY GENERAL OF FLORIDA, ET AL.

APPEAL FROM THE SUPREME COURT OF FLORIDA

No. 73–78. Argued February 25–26, 1974—Decided April 24, 1974

A Florida statute grants widows an annual $500 property tax exemption. Appellant, a widower, was denied an exemption because the statute offers no analogous benefit for widowers. He then sought a declaratory judgment in county circuit court, which held the statute violative of the Equal Protection Clause of the Fourteenth Amendment. The Florida Supreme Court reversed, finding the classification "widow" valid because it has a "fair and substantial relation to the object of the legislation" of reducing "the disparity between the economic capabilities of a man and a woman." *Held:*

1. The challenged tax law is reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for whom that loss imposes a disproportionately heavy burden. *Frontiero* v. *Richardson*, 411 U. S. 677, distinguished. P. 355.

2. A state tax law is not arbitrary although it "discriminate[s] in favor of a certain class . . . if the discrimination is founded upon a reasonable distinction, or difference in state policy," and the statute here is well within those limits. Pp. 355–356.

273 So. 2d 72, affirmed.

DOUGLAS, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 357. WHITE, J., filed a dissenting opinion, *post*, p. 360.

Ruth Bader Ginsburg argued the cause for appellant. With her on the briefs was *Melvin L. Wulf*.

Sydney H. McKenzie III, Assistant Attorney General of Florida, argued the cause for appellees. With him on the brief was *Robert L. Shevin*, Attorney General, *pro se*.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Since at least 1885, Florida has provided for some form of property tax exemption for widows.[1] The current law granting all widows an annual $500 exemption, Fla. Stat. § 196.202 (Supp. 1974–1975), has been essentially unchanged since 1941.[2] Appellant Kahn is a widower who lives in Florida and applied for the exemption to the Dade County Tax Assessor's Office. It was denied because the statute offers no analogous benefit for widowers. Kahn then sought a declaratory judgment in the Circuit Court for Dade County, Florida, and that court held the statute violative of the Equal Protection Clause of the Fourteenth Amendment because the classification "widow" was based upon gender. The Florida Supreme Court reversed, finding the classification valid because it has a " 'fair and substantial relation to the object of the legislation,' " [3] that object being the reduction of "the disparity between the economic capabilities of a man and a woman." Kahn appealed here, 28 U. S. C. § 1257 (2), and we noted probable jurisdiction, 414 U. S. 973. We affirm.

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[1] Article IX, § 9, of the 1885 Florida Constitution provided that: "There shall be exempt from taxation property to the value of two hundred dollars to every widow that has a family dependent on her for support, and to every person that has lost a limb or been disabled in war or by misfortune."

[2] In 1941 Fla. Stat. § 192.06 (7) exempted "[p]roperty to the value of five hundred dollars to every widow . . . ." That provision has survived a variety of minor changes and renumbering in substantially the same form, including Fla. Stat. § 196.191 (7) (1971) under which appellant was denied the exemption. Currently Fla. Stat. § 196.202 provides: "Property to the value of five hundred dollars ($500) of every widow, blind person, or totally and permanently disabled person who is a bona fide resident of this state shall be exempt from taxation."

[3] Quoting *Reed* v. *Reed*, 404 U. S. 71, 76.

There can be no dispute that the financial difficulties confronting the lone woman in Florida or in any other State exceed those facing the man. Whether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs.[4] There are, of course, efforts under way to remedy this situation. On the federal level, Title VII of the Civil Rights Act of 1964 prohibits covered employers and labor unions from discrimination on the basis of sex, 78 Stat. 253, 42 U. S. C. §§ 2000e–2 (a), (b), (c), as does the Equal Pay Act of 1963, 77 Stat. 56, 29 U. S. C. § 206 (d). But firmly entrenched practices are resistant to such pressures, and, indeed, data compiled by the Women's Bureau of the United States Department of Labor show that in 1972 a woman working full time had a median income which was only 57.9% of the median for males—a figure actually six points lower than had been achieved in 1955.[5] Other data point in the same direc-

[4] In 1970 while 40% of males in the work force earned over $10,000, and 70% over $7,000, 45% of women working full time earned less than $5,000, and 73.9% earned less than $7,000. U. S. Bureau of the Census: Current Population Reports, Series P–60, No. 80.

[5] The Women's Bureau provides the following data:

Year	Median earnings		Women's median earnings as percent of men's
	Women	Men	
1972	$5,903	$10,202	57.9
1971	5,593	9,399	59.5
1970	5,323	8,966	59.4
1969	4,977	8,227	60.5
1968	4,457	7,664	58.2
1967	4,150	7,182	57.8
1966	3,973	6,848	58.0
1965	3,823	6,375	60.0

[*Footnote 5 is continued on p. 354*]

tion.[6] The disparity is likely to be exacerbated for the widow. While the widower can usually continue in the occupation which preceded his spouse's death, in many cases the widow will find herself suddenly forced into a job market with which she is unfamiliar, and in which, because of her former economic dependency, she will have fewer skills to offer.[7]

Year	Median earnings		Women's median earnings as percent of men's
	Women	Men	
1964	$3,690	$6,195	59.6
1963	3,561	5,978	59.6
1962	3,446	5,794	59.5
1961	3,351	5,644	59.4
1960	3,293	5,417	60.8
1959	3,193	5,209	61.3
1958	3,102	4,927	63.0
1957	3,008	4,713	63.8
1956	2,827	4,466	63.3
1955	2,719	4,252	63.9

Note.—Data for 1962–72 are not strictly comparable with those for prior years, which are for wage and salary income only and do not include earnings of self-employed persons.

Source: Table prepared by Women's Bureau, Employment Standards Administration, U. S. Department of Labor, from data published by Bureau of the Census, U. S. Department of Commerce.

[6] For example, in 1972 the median income of women with four years of college was $8,736—exactly $100 more than the median income of men who had never even completed one year of high school. Of those employed as managers or administrators, the women's median income was only 53.2% of the men's, and in the professional and technical occupations the figure was 67.5%. Thus the disparity extends even to women occupying jobs usually thought of as well paid. Tables prepared by the Women's Bureau, Employment Standards Administration, U. S. Department of Labor.

[7] It is still the case that in the majority of families where both spouses are present, the woman is not employed. A. Ferriss, Indicators of Trends in the Status of American Women 95 (1971).

There can be no doubt, therefore, that Florida's differing treatment of widows and widowers "'rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation.'" *Reed* v. *Reed*, 404 U. S. 71, 76, quoting *Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415.

This is not a case like *Frontiero* v. *Richardson*, 411 U. S. 677, where the Government denied its female employees both substantive and procedural benefits granted males *"solely* . . . for administrative convenience." *Id.*, at 690 (emphasis in original).[8] We deal here with a state tax law reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden. We have long held that "[w]here taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U. S. 356, 359. A state tax law is not arbitrary although it "discriminate[s] in favor of a certain class . . . if the discrimination is founded upon a reasonable distinction, or difference in state policy," not in conflict with the Federal Constitution. *Allied Stores* v. *Bowers*, 358 U. S. 522, 528. This principle has weathered nearly a century of Supreme Court adjudica-

[8] And in *Frontiero* the plurality opinion also noted that the statutes there were "not in any sense designed to rectify the effects of past discrimination against women. On the contrary, these statutes seize upon a group—women—who have historically suffered discrimination in employment, and rely on the effects of this past discrimination as a justification for heaping on additional economic disadvantages." 411 U. S. 677, 689 n. 22 (citations omitted).

tion,[9] and it applies here as well. The statute before us is well within those limits.[10]

Affirmed.

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[9] See *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232, 237; *Madden* v. *Kentucky*, 309 U. S. 83, 87–88; *Lawrence* v. *State Tax Comm'n*, 286 U. S. 276; *Royster Guano Co.* v. *Virginia*, 253 U. S. 412.

[10] The dissents argue that the Florida Legislature could have drafted the statute differently, so that its purpose would have been accomplished more precisely. But the issue, of course, is not whether the statute could have been drafted more wisely, but whether the lines chosen by the Florida Legislature are within constitutional limitations. The dissents would use the Equal Protection Clause as a vehicle for reinstating notions of substantive due process that have been repudiated. "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, [which] are elected to pass laws." *Ferguson* v. *Skrupa*, 372 U. S. 726, 730.

Gender has never been rejected as an impermissible classification in all instances. Congress has not so far drafted women into the Armed Services, 50 U. S. C. App. § 454. The famous Brandeis Brief in *Muller* v. *Oregon*, 208 U. S. 412, on which the Court specifically relied, *id.*, at 419–420, emphasized that the special physical structure of women has a bearing on the "conditions under which she should be permitted to toil." *Id.*, at 420. These instances are pertinent to the problem in the tax field which is presented by this present case. Mr. Chief Justice Hughes in speaking for the Court said:

"The States, in the exercise of their taxing power, as with respect to the exertion of other powers, are subject to the requirements of the due process and the equal protection clauses of the Fourteenth Amendment, but that Amendment imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to schemes of taxation. . . . In levying such taxes, the State is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure." *Ohio Oil Co.* v. *Conway*, 281 U. S. 146, 159.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

The Court rejects widower Kahn's claim of denial of equal protection on the ground that the limitation in Fla. Stat. § 196.191 (7) (1971), which provides an annual $500 property tax exemption to widows, is a legislative classification that bears a fair and substantial relation to "the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden." *Ante*, at 355. In my view, however, a legislative classification that distinguishes potential beneficiaries solely by reference to their gender-based status as widows or widowers, like classifications based upon race,[1] alienage,[2] and national origin,[3] must be subjected to close judicial scrutiny, because it focuses upon generally immutable characteristics over which individuals have little or no control, and also because gender-based classifications too often have been inexcusably utilized to stereotype and stigmatize politically powerless segments of society. See *Frontiero* v. *Richardson*, 411 U. S. 677 (1973). The Court is not, therefore, free to sustain the statute on the ground that it rationally promotes legitimate governmental interests; rather, such suspect classifications can be sustained only when the State bears the burden of demonstrating that the challenged legislation serves overriding or compelling interests that cannot be achieved either by a more carefully tailored legislative classification or by the use of feasible,

[1] See *Loving* v. *Virginia*, 388 U. S. 1, 11 (1967); *McLaughlin* v. *Florida*, 379 U. S. 184, 191–192 (1964); *Bolling* v. *Sharpe*, 347 U. S. 497, 499 (1954).

[2] See *Graham* v. *Richardson*, 403 U. S. 365, 372 (1971).

[3] See *Oyama* v. *California*, 332 U. S. 633, 644–646 (1948); *Korematsu* v. *United States*, 323 U. S. 214, 216 (1944); *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943).

less drastic means. While, in my view, the statute serves a compelling governmental interest by "cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden," I think that the statute is invalid because the State's interest can be served equally well by a more narrowly drafted statute.

Gender-based classifications cannot be sustained merely because they promote legitimate governmental interests, such as efficacious administration of government. *Frontiero* v. *Richardson, supra; Reed* v. *Reed*, 404 U. S. 71 (1971). For "when we enter the realm of 'strict judicial scrutiny,' there can be no doubt that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality. See *Shapiro* v. *Thompson*, 394 U. S. 618 (1969); *Carrington* v. *Rash*, 380 U. S. 89 (1965). On the contrary, any statutory scheme which draws a sharp line between the sexes, *solely* for the purpose of achieving administrative convenience, necessarily commands 'dissimilar treatment for men and women who are . . . similarly situated,' and therefore involves the 'very kind of arbitrary legislative choice forbidden by the [Constitution] . . . .' *Reed* v. *Reed*, 404 U. S., at 77, 76." *Frontiero* v. *Richardson, supra*, at 690. But Florida's justification of § 196.191 (7) is not that it serves administrative convenience or helps to preserve the public fisc. Rather, the asserted justification is that § 196.191 (7) is an affirmative step toward alleviating the effects of past economic discrimination against women.[4]

I agree that, in providing special benefits for a needy segment of society long the victim of purposeful dis-

[4] Brief for Appellees 24–25; Tr. of Oral Arg. 29–31. The State's argument is supported by the Florida Supreme Court which held that the object of § 196.191 (7) was to help " 'reduce the disparity between the economic . . . capabilities of a man and a woman . . . .' " 273 So. 2d 72, 73 (1973).

crimination and neglect, the statute serves the compelling state interest of achieving equality for such groups.[5] No one familiar with this country's history of pervasive sex discrimination against women [6] can doubt the need for remedial measures to correct the resulting economic imbalances. Indeed, the extent of the economic disparity between men and women is dramatized by the data cited by the Court, *ante*, at 353–354. By providing a property tax exemption for widows, § 196.191 (7) assists in reducing that economic disparity for a class of women particularly disadvantaged by the legacy of economic discrimination.[7] In that circumstance, the purpose and effect of the suspect classification are ameliorative; the statute neither stigmatizes nor denigrates widowers not also benefited by the legislation. Moreover, inclusion of needy widowers within the class of beneficiaries would

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[5] Significantly, the Florida statute does not compel the beneficiaries to accept the State's aid. The taxpayer must file for the tax exemption. This case, therefore, does not require resolution of the more difficult questions raised by remedial legislation which makes special treatment mandatory. See Note, Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1113–1117 (1969).

[6] See *Frontiero* v. *Richardson*, 411 U. S. 677 (1973); *Sail'er Inn, Inc.* v. *Kirby*, 5 Cal. 3d 1, 485 P. 2d 529 (1971). See generally The President's Task Force on Women's Rights and Responsibilities, A Matter of Simple Justice (1970); L. Kanowitz, Women and the Law: The Unfinished Revolution (1969).

[7] As noted by the Court, *ante*, at 353–354.

"[D]ata compiled by the Women's Bureau of the United States Department of Labor show that in 1972 a woman working full time had a median income which was only 57.9% of the median for males—a figure actually six points lower than had been achieved in 1955 . . . . The disparity is likely to be exacerbated for the widow. While the widower can usually continue in the occupation which preceded his spouse's death, in many cases the widow will find herself suddenly forced into a job market with which she is unfamiliar, and in which, because of her former economic dependency, she will have fewer skills to offer." (Footnotes omitted.)

not further the State's overriding interest in remedying the economic effects of past sex discrimination for needy victims of that discrimination. While doubtless some widowers are in financial need, no one suggests that such need results from sex discrimination as in the case of widows.

The statute nevertheless fails to satisfy the requirements of equal protection, since the State has not borne its burden of proving that its compelling interest could not be achieved by a more precisely tailored statute or by use of feasible, less drastic means. Section 196.191 (7) is plainly overinclusive, for the $500 property tax exemption may be obtained by a financially independent heiress as well as by an unemployed widow with dependent children. The State has offered nothing to explain why inclusion of widows of substantial economic means was necessary to advance the State's interest in ameliorating the effects of past economic discrimination against women.

Moreover, alternative means of classification, narrowing the class of widow beneficiaries, appear readily available. The exemption is granted only to widows who complete and file with the tax assessor a form application establishing their status as widows. By merely redrafting that form to exclude widows who earn annual incomes, or possess assets, in excess of specified amounts, the State could readily narrow the class of beneficiaries to those widows for whom the effects of past economic discrimination against women have been a practical reality.

MR. JUSTICE WHITE, dissenting.

The Florida tax exemption at issue here is available to all widows but not to widowers. The presumption is that all widows are financially more needy and less trained

or less ready for the job market than men. It may be that most widows have been occupied as housewife, mother, and homemaker and are not immediately prepared for employment. But there are many rich widows who need no largess from the State; many others are highly trained and have held lucrative positions long before the death of their husbands. At the same time, there are many widowers who are needy and who are in more desperate financial straits and have less access to the job market than many widows. Yet none of them qualifies for the exemption.

I find the discrimination invidious and violative of the Equal Protection Clause. There is merit in giving poor widows a tax break, but gender-based classifications are suspect and require more justification than the State has offered.

I perceive no purpose served by the exemption other than to alleviate current economic necessity, but the State extends the exemption to widows who do not need the help and denies it to widowers who do. It may be administratively inconvenient to make individual determinations of entitlement and to extend the exemption to needy men as well as needy women, but administrative efficiency is not an adequate justification for discriminations based purely on sex. *Frontiero* v. *Richardson*, 411 U. S. 677 (1973); *Reed* v. *Reed*, 404 U. S. 71 (1971).

It may be suggested that the State is entitled to prefer widows over widowers because their assumed need is rooted in past and present economic discrimination against women. But this is not a credible explanation of Florida's tax exemption; for if the State's purpose was to compensate for past discrimination against females, surely it would not have limited the exemption to women who are widows. Moreover, even if past discrimination is considered to be the criterion for current tax exemption,

the State nevertheless ignores all those widowers who have felt the effects of economic discrimination, whether as a member of a racial group or as one of the many who cannot escape the cycle of poverty. It seems to me that the State in this case is merely conferring an economic benefit in the form of a tax exemption and has not adequately explained why women should be treated differently from men.

I dissent.